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No. _____

IN THE
Supreme Court of the United States

JOSEPH GROODY, ET AL.,
Petitioners

v.

JOHN DOE, PARENT AND NATURAL GUARDIAN OF MARY DOE, A MINOR, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the standard for incorporating an application or affidavit of probable cause into a search warrant be governed by the same "commonsense and realistic" standard used in interpreting the warrant itself?

PARTIES TO THE PROCEEDINGS

Petitioners are Joseph Groody, Adam Bermodin, Robert Phillips, and Robert Bruce, who are all police officers. Respondents are John Doe and Jane Doe, parents and natural guardians of Mary Doe, and Jane Doe in her own right.

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OPINIONS BELOW

The decision of the Court of Appeals is reported at 361 F.3d 232 and is reprinted at Pet. App. 1a-31a. The decision of the District Court is not reported, but is reprinted at Pet. App. 32a-62a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 2004. A petition for rehearing was timely filed and was denied on April 13, 2004. This petition is being filed within ninety days thereafter.

This Court has jurisdiction pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In this case, police officers sought authority, among other things, to search the individuals present at an identified location, who turned out to be the respondents. They prepared an affidavit of probable cause which specifically and repeatedly sought this

authority, and sought to establish probable cause to justify it. They submitted the affidavit to a magistrate, who issued the warrant. The affidavit of probable cause was incorporated by reference on the face of the warrant, and was physically attached to it. Nevertheless, the courts below, adopting a highly technical approach to incorporation, held that the resulting searches of respondents were *not* within the scope of the warrant, and that this should have been "manifest," Pet. App. 21a, to the officers, thus depriving them even of qualified immunity. The Court should review this decidedly odd result to clarify the standards which govern the incorporation of affidavits of probable cause into search warrants.

1. The search warrant which is at the center of this case was executed on March 6, 1998 at the residence of Michael McGinley in Ashland, Pennsylvania, by the four petitioners and other officers. McGinley had previously been convicted of drug offenses, and in February and March of 1998, the Drug Task Force had investigated allegations that McGinley was dealing drugs out of his residence. Pet. App. 65a. Officers had maintained surveillance of the McGinley residence, and on six occasions had used a confidential informant to make controlled purchases of methamphetamine in the residence, or in a car parked in front. Pet. App. 65a-68a.

In the experience of officers, drug dealers often try to remove, conceal, or destroy evidence when faced with a search or "impending apprehension." So the warrant asked permission to search all occupants of the residence and their belongings. Pet. App. 70a.

Accordingly, the affidavit of probable cause, in addition to seeking permission to search McGinley, his residence and his car, specifically noted that

> [T]he search should also include all occupants of the residence . . .. This application seeks permission to search all occupants of the residence and their belongings to prevent the removal, concealment or destruction of any evidence requested in this warrant.

Pet. App. 70a. The Affidavit of Probable Cause was attached to the face sheet of the search warrant application; and on the face sheet, the box for describing the probable cause to support the warrant incorporated the attached affidavit by reference. Pet. App. 63a. The box labeled "Specific Description of the Premises and/or Persons to be Searched" identified Michael McGinley and described his residence at 618 Chester Street, Ashland. This material filled the entire box, and there was no reference to the attached affidavit within that box. *Ibid.*

The warrant application, with its attached affidavit, was submitted to the Schuylkill County District Attorney's office, and approved by a district justice.

The officers served the warrant on McGinley's house, searching him, as well as his wife (Jane Doe), and daughter (Mary Doe), who were also present. The officers searched the house and found a variety of drugs, suspected drugs, and drug paraphernalia. After a female officer arrived, Jane and Mary Doe were also searched.

2. The Does then brought this action for damages pursuant to 42 U.S.C. § 1983,[1] claiming that Jane and

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[1] Richard Doe, the son of John and Mary Doe, was originally a plaintiff as well, but his claims were dismissed by stipulation.

Mary Doe had been subjected to unreasonable searches of their persons in violation of the Fourth Amendment.[2] After discovery, the petitioners moved for summary judgment, and the Does cross-moved for partial summary judgment on the issue of petitioners' liability.

The District Court denied the petitioners' motion and granted the Does' motion. Pet. App. 32a-62a. As to the four petitioners, the District Court held that the search of the persons of Jane and Mary Doe was beyond the scope of the search warrant which the police officers had been issued, and was not otherwise justified by probable cause or exigent circumstances. *See* Pet. App. 44a-46a. He further held that "it is clear that an officer may not conduct a warrantless search of a person absent probable cause." Pet. App. 47a. He therefore denied the appellants' claim of qualified immunity, and granted summary judgment to the plaintiffs on the issue of petitioners' liability.[3] The police officers appealed.

3. The police officers appealed, but a divided panel of the Court of Appeals affirmed the District Court's decision. Since the issue before it was whether the officers were entitled to qualified immunity, the Court of Appeals engaged in a two-step analysis. First, it considered whether a constitutional right was violated or the undisputed facts established a violation on the

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[2] The Does sued nine individuals, including four petitioners, plus six state and local governmental entities. Except for the claims against the petitioners and the Borough of Ashland, *see* Pet. App. 56a-57a, all of these claims were resolved in favor of defendants by stipulation, by order of dismissal, or on summary judgment.

[3] The only defendants remaining for trial, then, are the Borough of Ashland (as to liability and damages) and the petitioning police officers (as to damages only). Pet. App. 62a.

summary judgment record. Next, it considered whether the right was "clearly established."

On the first point, the majority said that the search of Jane and Mary Doe was not authorized by the warrant because they were not described in the warrant and the affidavit of probable cause was not properly incorporated into the warrant for that purpose. The court recognized that accompanying affidavits may be considered with warrants if they are incorporated, and further recognized that the affidavit in the case before it *was* incorporated for purposes of probable cause but found "this fact . . . actually unhelpful to the officers, since it demonstrates that where the face sheet was intended to incorporate the affidavit, it said so explicitly." Pet. App. 11a. The court went on to say that the use of the affidavit to supply the identity of additional persons to be searched did not fit within what it viewed as the two traditional categories of cases in which affidavits have been used: to clarify ambiguities in the warrant, or to narrow the scope of an overbroad warrant. Pet. App. 12a-14a.

The majority took support for its conclusions from the Court's decision in *Groh v. Ramirez*, 124 S.Ct. 1284 (2004), which it termed "strikingly similar." Pet. App. 15a. The majority took from *Groh* the principle that items described in the affidavit must be set forth in the warrant itself to ensure that the issuing Magistrate intended them to be covered by the search, and said that "that rule disposes of appellants' reliance on the affidavit here." Pet. App. 17a.

The majority also concluded that the officers were not entitled to qualified immunity, describing the question as "whether, in 1999, when these searches occurred, it was clearly established that police could not broaden the scope of a warrant with an unincorporated affidavit." Pet. App. 19a. The court found it

"significant" that "the officers can point to no precedent that allowed an unincorporated affidavit to *expand* a search warrant." Pet. App. 20a.

Judge Alito dissented. In his view, the "commonsense and realistic" reading of the warrant was that the Magistrate intended to authorize a search of all occupants of the premises. Pet. App. 22a. Judge Alito noted that the warrant application clearly requested permission to search all occupants of the premises, attempted to establish probable cause to search all occupants of the premises, Pet. App. 22a-23a, and was "expressly incorporated" into the warrant "with respect to the issue that was most critical to the request to search all occupants, *viz*, the issue of probable cause." Pet. App. 24a. Judge Alito went on to point out that the warrant was drafted by the officers who applied for it, and who intended it to authorize a search of all persons on the premises, and the Magistrate signed the warrant without alteration. Pet. App. 23a-24a.

Judge Alito thought that *Groh* was distinguishable on the facts, since the affidavit in that case was sealed, was not attached to the warrant at time of service, and was not incorporated by it in any way. Pet. App. 28a-29a. *Groh*, Judge Alito concluded, "simply does not speak to the question that divides this panel, *i.e.*, the degree of technical precision that should be demanded in determining whether a warrant adequately incorporated an attached application or affidavit." Pet. App. 28a Judge Alito concluded that the appropriateness of "words of incorporation" ought to be judged by the same "commonsense and realistic" standard that is generally to be used in interpreting warrants. Pet. App. 29a.

Judge Alito believed that the warrant authorized the search, and that the officers were entitled to qualified immunity.

REASONS FOR GRANTING THE WRIT

The question of what is necessary to incorporate an affidavit of probable cause into the warrant itself is an important and unsettled one, and the Court should accept this case to provide guidance.

1. It has long been accepted that search warrants are to be read in a common sense, non-technical fashion, *see United States v. Ventresca*, 380 U.S. 102, 109 (1965), yet the Court has provided no such specific guidance with respect to incorporation of applications for search warrants and affidavits supporting them. The issue is important because search warrants always issue on the basis of application and affidavits of probable cause, and, by rule or statute, states often require, as Pennsylvania does, that they be attached to the warrant or served with it. *See, e.g.*, Pa. R. Crim. P. 208A (copy of warrant and affidavit to be left at premises searched); Alaska Stat. §12.35.025 (Michie 2002 and Supp. 2003) (copy of warrant and supporting affidavit to be given to person from whom or from whose premises property taken); Colo. Rev. Stat. Ann. §41(c)(2) (West 2003) (affidavit to be attached to warrant); Conn. Gen. Stat. Ann. §54-33c(a) (West 2001) (copy of application and supporting affidavits to be given to person whose premises searched within 48 hours); Mich. Comp. Laws §780.654(4)(2) (2001 & Supp. 2004) (warrant to state grounds for probable cause or attach affidavit); Nev. Rev. Stat. Ann. § 179.045(5)(d) (Michie 2001 & Supp. 2003) (warrant must incorporate affidavit by reference); N.C. Gen. Stat. § 15A-252 (2003) (warrant, application, and affidavit to be given to person searched); Va. Code Ann. § 19.2-56 (Michie 2000) (affidavit to be attached to warrant).

In addition, although courts have recognized that affidavits accompanying and incorporated by a warrant

may be used in construing the warrant's scope. *See Groh v. Ramirez*, 124 S.Ct. 1284 (2004); *United States v. Johnson*, 690 F.2d 60, 64-65 (3d Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983), the Court has not yet spoken authoritatively on the way in which an affidavit may be incorporated into a warrant, and its most recent decision touching on the topic, *Groh*, while expressly leaving the question open, has caused some confusion – at least to the Third Circuit, which should now be clarified.

In *Groh*, the Court said that a warrant was defective because it did not describe with particularity the type of evidence sought. The application did describe it, but the application was not incorporated in the warrant, was not attached to or served with it, and had been placed under seal. The Court limited its holding, and did not say how an affidavit might properly be incorporated, referring only to "appropriate words of incorporation:"

> We do not say that the Fourth Amendment forbids a warrant from cross-referencing other documents. Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant . . . . .. But in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been place under seal) accompany the warrant. Hence, we need not further explore the matter of incorporation.

124 S.Ct. at 1280.

Nevertheless, the majority of the Court of Appeals panel in this case cited *Groh* as support for its conclusion that an affidavit attached to a search

warrant, served with it, and specifically incorporated in it for purposes of probable cause cannot be read with the warrant to authorize a search of individuals named in the affidavit but not the warrant. The Court of Appeals was wrong because its decision does not follow the "common sense and realistic" approach that the Court has said applies to construing warrants, and which we believe ought also to be sensibly applied to the issue of the incorporation of papers supporting the warrant. Instead, the Court of Appeals used a technical and legalistic approach, reading the warrant, as the dissenter observed, like a contract to be construed against its authors. Pet. App. 29a-30a. The Court of Appeals' approach ignores the Court's observation concerning warrants, no less apt here, that they are "normally drafted by nonlawyers in the midst and haste of a criminal investigation." *United States v. Ventresca*, 380 U.S. at 108.

The Court of Appeals also wrongly concluded that the officers were not entitled to qualified immunity because they could point to no case that "allowed an unincorporated affidavit to *expand* a search warrant." Pet. App. 20a. The rule, of course, is otherwise: that officers are shielded from liability unless they violate clearly established constitutional rights. *See Malley v. Briggs*, 475 U.S. 335 (1986), and the Court has said that "if judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). In this case, the law on the critical incorporation issue was far from settled, and it is to this issue that we now turn.

2. The Court of Appeals approach is at odds with the Pennsylvania Supreme Court and with decisions of other Courts of Appeals.

In *Commonwealth v. Carlisle*, 534 A.2d 469 (1987), for example, the court said that warrants "are to be interpreted in a common-sense, not in a hypertechnical fashion," 534 A.2d at 472, and used a common sense approach to the affidavit as well, reading an affidavit attached to the warrant to clarify the scope of a search, which, through what the court perceived as inadvertence on the part of the officers, was unclear on the face of the warrant.[4] The majority of the panel in this case read *Carlisle* as supporting its thesis that supporting affidavits could be used to narrow the scope of an unconstitutionally broad warrant, but not to broaden a narrower warrant, but the decision in *Carlisle* does not turn on this distinction. It focuses, rather, on the use of the affidavit to cure an inadvertent omission by the officers who applied for and drafted the warrant.

The approach taken by the Courts of Appeals is diverse, though none articulates a rule as strict as the Third Circuit's. The Ninth Circuit, for example, has declined to require any "magic words of incorporation." *United States v. Vesikuru*, 314 F.3d 1116, 1121 (9th Cir. 2002), or even physical attachment to the warrant, but has held that an affidavit accompanying a warrant was "sufficiently incorporated" for purposes of setting forth the conditions precedent to justify an anticipatory search warrant, "given the agents' reliance on the affidavit, the state practice of attaching the affidavit to the warrant and reading the affidavit and warrant as

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[4]Similarly, in a decision post-dating *Groh*, the North Carolina Court of Appeals distinguished *Groh* on the facts, and held that an affidavit was incorporated into a search warrant by language stating that probable cause was based on the application and by directing in the warrant that the search include premises and persons "described in the application." *See State v. Carrillo*, 595 S.E.2d 219 (N.C. Ct. App. 2004).

one document, and the express language in the warrant providing that probable cause to search is based upon the sworn complaint." 314 F.3d at 1121. In a similar vein, the Tenth Circuit has held that an affidavit neither attached nor specifically incorporated in a warrant may nevertheless be read with the warrant to cure a complaint of lack of particularity where the same officer produced the affidavit and executed the warrant. *See United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998); *United States v. Ortega-Jimenez*, 232 F.3d 1325 (10th Cir. 2000).

Yet, on the other end of the spectrum and closer to the Third Circuit's approach, the District of Columbia Circuit has held that an affidavit merely referenced in the warrant was not incorporated into it for purposes of resolving questions of particularity. *See United States v. Maxwell*, 920 F.2d 1028 (D.C. Cir. 1990). The Court required express words of incorporation, but did distinguish an earlier case, *Moore v. United States*, 461 F.2d 1236 (D.C. Cir. 1972), in which it reached a different result because a statute in effect at the time required that probable cause affidavits be attached to search warrants.

Thus, the importance of the issue, and the differing approaches to it warrant the Court's granting the petition and answering the question reserved in *Groh*: just what is necessary to incorporate an affidavit of probable cause into the search warrant it supports.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

PRECEDENTIAL

UNITED SATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-4532

JOHN DOE, Parent and Natural Guardian of Mary Doe, a minor; JANE DOE, Parent and Natural Guardian of Mary Doe, a minor, and in her own right; RICHARD DOE

v.

JOSEPH GROODY; MICHAEL AULENBACH; ADAM BERMODIN; SUSAN JONES; BOROUGH OF ASHLAND; ROBERT PHILLIPS; JEFFREY WALCOTT; R.P. SCHAEFFER; BOROUGH OF SCHUYLKILL HAVEN; JACK SHEARIN; BOROUGH OF FRACKVILLE; ROBERT BRUCE, Office of the Attorney General, Bureau of Narcotics Investigation (BNI), Commonwealth of Pennsylvania; OFFICE OF ATTORNEY GENERAL, BUREAU OF NARCOTICS INVESTIGATION (BNI), COMMONWEALTH OF PENNSYLVANIA; SCHUYLKILL COUNTY DRUG TASK FORCE, County of Schuylkill

Joseph Groody; Adam Bermodin; Robert Phillips; Robert Bruce,
Appellants

On Appeal from the United States District Court for the Middle District of Pennsylvania (Dist. Court No. 00-cv-00356) District Judge: Honorable James F. McClure, Jr.

Argued: September 15, 2003

Before: ALITO, AMBRO and CHERTOFF, Circuit Judges.

(Filed March 19, 2004)

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OPINION OF THE COURT

CHERTOFF, Circuit Judge.

Four police officers appeal from the denial of qualified immunity in a lawsuit alleging the unlawful search of occupants of a residence in Schuylkill County, Pennsylvania. The officers argue that they did not violate clearly established federal constitutional rights when they searched a mother and her ten year old daughter in the course of executing a search warrant for narcotics at their home.

The appeal turns on the scope of search authorized by the warrant. To resolve this issue, we must consider under what circumstances the scope of a warrant may be expanded by looking to the accompanying affidavit. We hold it to be clearly established that unless a search warrant specifically incorporates an affidavit, the scope of the warrant may not be broadened by language in that affidavit. We also conclude that, under any reasonable reading, the warrant in this case did not authorize the search of the mother and daughter, and that the search was not otherwise justified. Accordingly, we will affirm the District Court's determination that the officers are not entitled to qualified immunity.

I.

On March 6, 1998, as the result of a long-term investigation of John Doe for suspected narcotics dealing, officers of the Schuylkill County Drug Task Force ("Task Force") sought a search warrant for Doe and his residence.[1] The typed affidavit in support of the warrant application stated, in pertinent part, that a reliable confidential informant had purchased methamphetamine on several occasions from John Doe, at Doe's "residence/office," or from a Volkswagen automobile parked in front. In addition, the affidavit noted that individuals with histories of prior narcotics use or with drug gang affiliations had been observed by Task Force members entering or leaving John Doe's residence. Finally, the affidavit indicated that the most recent methamphetamine purchase by the informant had occurred within the preceding 48 hours.

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[1] We refer to the family in question as Doe because they filed their case under that name, although the actual names of family members are disclosed in the record.

The typed affidavit requested permission to search John Doe's residence and his Volkswagen for drugs, paraphernalia, money, drug records and other evidence. Additionally, the affidavit stated:

> The search should also include all occupants of the residence as the information developed shows that [Doe] has frequent visitors that purchase methamphetamine. These persons may be on the premises at the time of the execution of the search warrant and many attempt to conceal controlled substances on their persons.
>
> . . .
>
> This application seeks permission to search all occupants of the residence and their belongings to prevent the removal, concealment, or destruction of any evidence requested in this warrant. It is the experience of your co-affiants that drug dealers often attempt to do so when faced with impending apprehension and may give such evidence to persons who do not actually reside or own/rent the premises. This is done to prevent the discovery of said items in hopes that said persons will not be subject to search when police arrive.
>
> . . .
>
> As a result of the information developed, your affiant requests that a search warrant . . . be issued for . . .the residence of [John Doe] and all occupants therein.

¶¶ 17, 20, & 21.

The typed affidavit was signed on the last page by a police officer, under whose signature was the entry: "Sworn and subscribed before District Justice James R. Ferrier 21-3-03, this 6th of March 1998." Under the legend was the Magistrate's signature, followed by the phrase "Issuing Authority" and the impression of a rubber stamp.

The warrant was attached to a separate printed face sheet, entitled "Search Warrant and Affidavit." That form contained boilerplate introductory language, followed by open blocks for someone to type information. The first block asked for the identity of the "items to be search for and seized." The following blocks asked, in turn, for a "[s]pecific description of premises and/or persons to be searched"; the "[n]ame of owner, occupant or possessor of said premises to be searched"; a description of the nature and date of the statutory violations; and for the basis of "[p]robable cause belief." Finally, the printed face sheet contained a space to delineate the results of the search, to be completed after the warrant was executed.

These printed blocks were completed. In response to the questions "[d]ate- of violation" and "[p]robable cause belief," the face sheet specifically referred to the typed affidavit of probable cause attached to the warrant. But in answering the question "[s]pecific description of premises and/or persons to be searched," the attached typed affidavit was not mentioned. Rather, the form contained a typewritten entry naming only John Doe, giving his description, date of birth and social security number, and identifying and describing John Doe's residence.

The printed warrant and affidavit face sheet was signed by the same police officer and "issuing authority" who had signed the underlying typed affidavit.

Armed with the warrant, Task Force police went to the John Doe house to carry out the search. Evidently, they anticipated encountering females because they enlisted a female traffic meter patrol officer to be available if necessary to assist in the search. As the officers approached the house, they met John Doe, and brought him into the house. Once inside, however, the officers found no visitors, but only John Doe's wife, Jane, and their ten year old daughter, Mary.

The officers decided to search Jane and Mary Doe for contraband, and sent for the meter patrol officer. When she arrived, the female officer removed both Jane and Mary Doe to an upstairs bathroom. They were instructed to empty their pockets and lift their shirts. The female officer patted their pockets. She then told Jane and Mary Doe to drop their pants and turn around. No contraband was found. With the search completed, both Jane and Mary Doe were returned to the ground floor to await the end of the search.

John and Jane Doe filed a complaint under 42 U.S.C. § 1983 on their own behalf, and on behalf of Mary Doe, against the searching officers and their superiors, and against various government entities. The Does alleged, among other things, that the officers illegally strip searched Jane and Mary Doe. After preliminary litigation skirmishing, a number of claims and parties were dismissed, and discovery was conducted. Cross motions for summary judgment were filed. One of these was a motion by individual police officers for summary judgment rejecting the strip search claim on the ground of qualified immunity. The District Court granted the motion for two officers, but denied qualified immunity to officers Joseph Groody, Adam Bermodin, and Robert Phillips and Agent Robert Bruce, the four Task Force officials who were directly involved in the search of Jane Doe and Mary Doe. The

District Judge also granted partial summary judgment against those four officers on the issue of liability.

The four Task Force officers appeal the denial of summary judgment based on qualified immunity.

II.

We have jurisdiction over that portion of the District Court's decision rejecting the claim of qualified immunity by the four officers. Although the litigation below is far from concluded, a denial of qualified immunity that turns on an issue of law – rather than a factual dispute – falls within the collateral order doctrine that treats certain interlocutory decisions as "final" within the meaning of 28 U.S.C. § 1291. *Behrens v. Pelletier*, 516 U.S. 299, 307, 313 (1996); *Mitchell v. Forsythe*, 472 U.S. 511, 525 (1985); *In re Montgomery County*, 215 F.3d 367, 373 (3d Cir. 2000). All parties here acknowledge, and we agree, that there is no genuine issue of fact that relates to the qualified immunity issue that is being appealed. Accordingly, we may decide this appeal. Our review of this legal issue is plenary. *Eddy v. V.I. Water and Power Auth.*, 256 F.3d 204, 208 (3d Cir. 2001); *Torres v. McLaughlin*, 163 F.3d 169, 170 (3d Cir. 1998).

Qualified immunity protects law enforcement officers from being tried for actions taken in the course of their duties. If the immunity applies, it entitles the officer to be free of the "burdens of litigation." *Mitchell*, 472 U.S. at 526. But the immunity is forfeited if an officer's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To determine in this case whether the officers have lost their immunity, we must engage in a two step analysis. First, we must decide "whether a

constitutional right would have been violated on the facts alleged . . .." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Because we consider an appeal by the officers from the denial of their motion for summary judgment, we must evaluate the undisputed facts based on the summary judgment record, drawing all inferences in favor of the plaintiff. *Behrens*, 516 U.S. at 309; *Torres*, 163 F.3d at 170. Second, if we believe that a constitutional violation did occur, we must consider whether the right was "clearly established." *Saucier*, 533 U.S. at 201; *see Groh v. Ramirez*, 540 U.S. ___, No. 02-811, slip op. at 12 (U.S. filed Feb. 24, 2004).[2] The question is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. This is an objective inquiry, to be decided by the court as a matter of law. *Bartholomew v. Pennsylvania*, 221 F.3d 425, 428 (3d Cir. 2000).

III.

The constitutional violation at issue here arises under Jane and Mary Doe's Fourth (and Fourteenth) Amendment rights to be free of unreasonable searches and seizures.[3] Both Jane and Mary Doe were physically removed to the bathroom of their house and detained there for a period of time. They were asked to remove or shift articles of clothing and were visually inspected and touched by a female officer who was searching for contraband. Later, they were moved to

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[2] *Groh*, which bears heavily on this case, was decided well after this case was briefed and argued. That decision has not altered the law that previously applied in this area.

[3] Because the Fourth Amendment (as incorporated into the Fourteenth) furnishes the "explicit textual source" for the constitutional protection against unlawful searches and seizures, we look to it, rather than more general notions of due process, in analyzing the claim of constitutional violation. *Albright v. Oliver*, 510 U.S. 266, 273 (1994).

the ground floor and detained there during the balance of the house search.

The nature of the intrusion alleged is significant. In *Leveto v. Lapina*, 258 F.3d 156, 172-75 (3d Cir. 2001), this Court held that, as of 2001, it was unclear whether police searching a premises could permissibly detain those present or "frisk" them for protective purposes. But the facts here are different than those in *Leveto*. Although Jane and Mary Doe were detained during the course of the search in this case, the District Court denied qualified immunity for the *search*, not the *detention*. Insofar as *Leveto* discusses detention, therefore, it is irrelevant to this issue. Similarly, neither the Does nor the officers contend that the search here was a protective "frisk" or search for weapons that is justified on less than full probable case. *See Terry v. Ohio*, 392 U.S. 1, 16, 25-30 (1968); *Leveto*, 258 F.3d at 163-64. Rather, the officers concede that Jane and Mary Doe were searched for possible evidence or contraband, and not because they were viewed as possibly armed or dangerous. Indeed, it is difficult to conceive how the search of a ten-year old child in these circumstances could be justified as part of a "protective sweep." Because the decision in *Leveto* concerned the special rules governing protective searches, it simply does not address the non-protective body search that is before us in this matter.

A non-protective search must normally be supported by probable cause, and, with certain exceptions, must be authorized by a warrant. The officers principally argue that the search of both females was covered by the warrant for the search of the house and was supported by probable cause. If a warrant did indeed authorize a search of Jane and Mary Doe, then the officers were entitled to rely upon it to satisfy the probable cause requirement, and there was no

constitutional violation.[4] *United States v. Leon*, 468 U.S. 897, 922 (1984).

The face of the search warrant here, however, does not grant authority to search either Jane or Mary Doe. The block designated for a description of the person or place to be searched specifically names John Doe, and identifies and describes his residence. Nothing in that portion of the printed warrant refers to any other individual, named or unnamed, to be searched. Seeking to remedy this omission, the officers argue that the warrant should be read in light of the accompanying affidavit which requested permission to search "all occupants" of the residence. They conclude that the warrant should be read in "common sense" fashion, as supplemented by the affidavit. If that contention is correct, then police had legal authority to search anybody that they encountered inside the house when they came to execute the warrant.

To be sure, a warrant must be read in a common sense, non-technical fashion. *United States v. Ventresca*, 380 U.S. 102, 109 (1965). But it may not be read in a way that violates its fundamental purposes. As the text of the Fourth Amendment itself denotes, a particular description is the touchstone of a warrant. U.S. Const. amend. IV. The requirement of a particular description *in writing* accomplishes three things. First, it memorializes precisely what search or seizure the issuing magistrate intended to permit. Second, it confines the discretion of the officers who are executing the warrant. *Marron v. United States*, 275 U.S. 192, 196 (1927). Third, it "inform[s] the subject of the

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[4] Of course, that reliance presupposes that there is no deliberate material misrepresentation in the supporting affidavit. *See Franks v. Delaware*, 438 U.S. 154, 155 (1978). There is no allegation of such a misrepresentation in this case.

search what can be seized." *Bartholomew*, 221 F.3d at 429. For these reasons, although a warrant should be interpreted practically, it must be sufficiently definite and clear so that the magistrate, police, and search subjects can objectively ascertain its scope. *See Groh*, 540 U.S. at ___, slip op. at 5.

As the officers correctly observe, it is perfectly appropriate to construe a warrant in light of an accompanying affidavit or other document that is incorporated within the warrant. But to take advantage of this principle of interpretation, the warrant must expressly incorporate the affidavit. *Bartholomew*, which the officers invoke, makes this very point. In that case, we observed that "'[w]hen a warrant is accompanied by an affidavit that is incorporated by reference, the affidavit may be used in construing the scope of the warrant.'" *Id.* at 428 (quoting *United States v. Johnson*, 690 F.2d 60, 64-65 (3d Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983)). We dwelled at some length on the importance of making that incorporation clear. *Id.* at 428 & n.4 (citing cases). The Supreme Court has very recently re-emphasized this point in *Groh*. 540 U.S. at ___, slip op. at 6.

In this case, there is no language in the warrant that suggests that the premises or people to be searched include Jane Doe, Mary Doe, "all occupants" or anybody else, save John Doe himself. Other portions of the face sheet which describe the date of the violation and the supporting probable cause do refer to the attached typed affidavit. But this fact is actually unhelpful to the officers, since it demonstrates that where the face sheet was intended to incorporate the affidavit, it said so explicitly. As a matter of common sense, as well as logic, the absence of a reference to the

affidavit must therefore be viewed as negating any incorporation of that affidavit.[5]

We recognize that there are decisions in which an affidavit has been used to save a defective warrant even when it has not been incorporated within that warrant. But the cases fall into two categories. The first embraces those circumstances in which the warrant contains an ambiguity or clerical error that can be resolved with reference to the affidavit. In these situations, it is clear that the requesting officers and the magistrate agreed on the place to be searched or item to be seized, but there is an obvious ministerial error in misidentifying or ambiguously identifying the place or item. *See, e.g., United States v. Ortega-Jimenez*, 232 F.3d 1325, 1329 (10th Cir. 2000) (ambiguous term); *United States v. Simpson*, 152 F.3d 1241, 1248 (10th Cir. 1998) (internal inconsistency in warrant). Reliance on the affidavit in these circumstances neither broadens nor shrinks the scope of the warrant, but merely rectifies a "[m]inor irregularit[y]." *United States v. Johnson*, 690 F.2d at 65 n.3 (quoting *Ventresca*, 380 U.S. at 108).

The omission of Jane Doe, Mary Doe, or "all occupants" from the warrant in this case cannot be viewed as the sort of ambiguity or misidentification error that can be clarified by inspecting the affidavit. This warrant has no ambiguous or contradictory terms on its face. Rather, the language of the warrant is inconsistent with the language of the affidavit, because

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[5] At oral argument, counsel for the officers suggested that the signature of the Magistrate under the oath line on the affidavit somehow converted the affidavit into a warrant. But counsel conceded that there is nothing in the record to support the notion that, by witnessing the affiant's oath, the judge intended to covert the police officer's wish into a judicial command. Without some support for this strained contention, we decline to adopt it.

the former does not grant what the latter sought – permission to search "all occupants" of the house. That is not a discrepancy as to form; it is a difference as to scope. And it is a difference of significance. A state magistrate reviewing a search warrant affidavit might well draw the line at including unnamed "all occupants" in the affidavit because Pennsylvania law disfavors "all occupant" warrants. *See Commonwealth v. Gilliam*, 560 A.2d 140, 142 (Pa. 1989). Thus, the circumstances of this warrant are a far cry from those in the category of warrants which can be "clarified" by a separate affidavit.

The second category of decisions in which an unincorporated affidavit has been read to modify a search warrant is constituted by cases in which the affidavit is particularized by the warrant is overbroad. *See, e.g., United States v. Bianco*, 998 F.2d 1112, 1116-17 (2d Cir. 1993); *United States v. Towne*, 997 F.2d 537, 547 n.5 (9th Cir. 1993) (discussing cases). So long as the actual search is confined to the *narrower* scope of the affidavit, courts have sometimes allowed the unincorporated affidavits to "cure" the warrant, *id.*, or at least have treated the excessive elements of the warrant as harmless surplusage, *see United States v. Stefonek*, 179 F.3d 1030, 1033-34 (7th Cir. 1999).[6]

Commonwealth v. Carlisle, 534 A.2d 469 (Pa. 1987), cited by the officers on this appeal, is a good example. There, the police searched a specific apartment at an address. The affidavit identified the apartment number and street address, but the search warrant only mentioned the street address. Noting that the officers had only searched the specific apartment for which they had requested the warrant, the Supreme Court of

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[6] For the same reasons, this Court has upheld redaction as a means of narrowing a warrant. *United States v. Christine*, 687 F.2d 749, 759-60 (3d Cir. 1982).

Pennsylvania held that the arguably overbroad scope of the warrant should be read narrowly in light of the affidavit. In other words, the warrant clearly authorized the search of the specific apartment and, perhaps, too much more. Since the police limited themselves to the narrow search – which was clearly permitted by the warrant and supported by the affidavit – the affidavit was permitted to narrow the scope of the warrant. Tellingly, the court observed that had the police searched more broadly, the fruits of that search would have been suppressed. *Id.* at 472.

In the case we consider now, however, the circumstances are precisely the reverse of the preceding category of "cure" cases. Here, the affidavit is broader than the warrant, and the police in fact searched more broadly then the warrant. Unlike *Carlisle*, then, the officers seek to use the affidavit to expand, rather than limit, the warrant. That makes all the difference.

The warrant provides the license to search, not the affidavit. Cases such as *Bianco, Towne* and *Carlisle* may allow us to rescue an overbroad warrant if the police forbear from exercising the full measure of its excessive scope. It does not follow that we can rescue an overbroad search if the police exceed the full measure of the warrant. Bluntly, it is one thing if officers use *less* than the authority erroneously granted by a judge. It is quite another if officers go *beyond* the authority granted by the judge. Were we to adopt the officers' approach to warrant interpretation, and allow an unincorporated affidavit to expand the authorization of the warrant, we would come dangerously close to displacing the critical role of the independent magistrate.

This point was reemphasized forcefully this term by the Supreme Court in *Groh v. Ramierz*. In *Groh*, the Bureau of Alcohol, Tobacco and Firearms completed an

application and *affidavit* that detailed with specificity that the agents sought to search for and seize a cache of firearms suspected to be located at the home of Joseph Ramirez. *Groh*, 540 U.S. at ___, slip op. at 2. The *warrant* was less specific. In the portion of the printed warrant form "that called for a description of the 'person or properly' to be seized," the agents identified the location to be searched, but neither listed the items to be seized nor "incorporate[d] by reference the itemized list contained in the application." *Id.* The warrant did refer to the affidavit by reciting that the Magistrate was satisfied that the affidavit established probable cause to believe that contraband was concealed on the premises. *Id.* On the authority of the warrant, the Bureau searched Ramirez's house. *Id.* at 3. The Bureau did not seize anything, nor were any charges filed against Ramierz.[7] *Id.* Ramirez sued Groh and the other officers for a Fourth Amendment violation.

The facts in *Groh* were strikingly similar to those in this case:

In *Groh*, as here, the agents submitted an application and affidavit that detailed what they wanted to search *and* to seize. *Id.* at 2.

In *Groh*, as here, the affidavit sought to supply probable cause to search for, and seize, those listed items. *Id.*

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[7] At the conclusion of the search, agents provided Ramirez's wife with a copy of the warrant, though not a copy of the application and affidavit, which had been sealed. Agents did provide copies of the relevant portions of the application upon a request by Ramirez's lawyer, however. *Groh*, 540 U.S. at ___, slip op. at 3.

In *Groh*, as here, the warrant form was prepared by the officer who wrote the affidavit, and who presumably intended the warrant to authorize the search and seizure of the items in the affidavit. *Id.* at 12.[8]

In *Groh*, as here, the warrant expressly referred to the affidavit in affirming the existence of probable cause, but not in describing what was to be searched and seized. *Id.* at 2-3.

In *Groh*, as here, the Magistrate reviewed the warrant and affidavit, and did not alter the warrant before signing it.

On these facts, the Supreme Court held the search warrant invalid. *Id.* at 11. The Court's reasoning turned precisely on the sharp distinction the law draws between what is authorized in a warrant, and what is merely an application by the police. *Id.* at 5-6. The Court recognized that the application and affidavit contained an adequate description of the items to be seized, but observed that because neither was incorporated by reference into the warrant description of "'persons or property' to be seized," their contents were irrelevant. *Id.* at 2, 5-6. But the Court explicitly rejected the argument that one could infer that the Magistrate must have intended the warrant to authorize the full scope of what was sought in the affidavit:

> [U]nless the particular items describe in the affidavit are also set forth in the warrant itself . . . there can be no written

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[8] Indeed, because the officer who wrote the affidavit also drafted the warrant form, the Supreme Court found the defective warrant *less* justifiable, saying: "Because petitioner himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate's assurance that the warrant contained an adequate description . . .." *Id.* at 12.

> assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned n the affidavit.
>
> . . .
>
> The mere fact that the Magistrate issued a warrant does not necessarily establish that he agreed that the scope of the search should be as broad as the affiant's request.

Id. at 8, 9. That rule disposes of appellants' reliance on the affidavit here.

Moreover, this case would be a particularly bad instance in which to allow a broad affidavit to overwhelm a narrow warrant. For when we examine the affidavit on which the officers rely, it is doubtful that probable cause exists to support a search of John Doe's wife and minor daughter. Paragraphs 17 and 20 – which are the provisions seeking to justify an "all occupants" search – quite specifically argue that visitors may be present purchasing drugs and that dealers often give contraband to non-residents of a house in the hopes they will not be searched. We look in vain for any assertion that narcotics dealers often hide drugs on family members and young children. Perhaps they do; but the judge reviewing this affidavit would not know it. So, if anything, these paragraphs of the affidavit appear to undermine the probable cause to search Jane and Mary Doe. That is all the more reason to doubt that the Magistrate's failure to include these two family members in the warrant was an oversight. And that also makes it all the less reasonable to read permission to search them into the text of the warrant.

We are mindful that search warrants and affidavits are often prepared under time pressure and should not be subjected to microscopic dissection. But the

warrant plays a critical role under the Fourth Amendment. At some point, flexibility becomes breakage. The warrant must be written with objective definition, or its scope will not be discernable to those who are bound to submit to its authority, whether they are police or subjects of the search. By the same token, without a clear reference to the affidavit in the warrant, the former cannot simply be assumed to broaden the latter. Otherwise, we might indeed transform the judicial officer into little more than the cliché "rubber stamp."

Finally, we consider whether the search of Jane and Mary Doe can be justified on some basis other than the warrant. The officers have not seriously pressed this argument, but the District Court did consider whether the officers had probable cause to search Jane and Mary Doe under an exception to the warrant requirement.

None appears. A search warrant for a premises does not constitute a license to search everyone inside. *Ybarra v. Illinois*, 444 U.S. 85 (1979). The record does not disclose any independent basis to suspect Jane Doe – let alone 10-year old Mary Doe – of drug activity. While the officers justified their decision to conduct the personal searches because of the ease with which contraband could be concealed on those present in the searched premises, that is precisely the justification for a personal search that has been rejected by the Supreme Court. *Id.* at 94-96. Simply put, there is none of the kind of "particularized" probable cause required for a search in circumstances such as these. *Id.* at 91.

IV.

Having determined that the search of Jane and Mary Doe violated the Fourth Amendment, what

remains is to decide whether this violation transgressed "clearly established" rights. The District Court held that it did, and the officers argue that the District Court applied the "clearly established" test at too high a level of generality.

We agree that in determining whether a right is "clearly established," we should analyze the right with specificity. *Bartholomew*, 221 F.3d at 429. Where a challenged police action presents a legal question that is "unusual and largely heretofore undiscussed," *id.* at 429, or where there is "at least some significant authority" that lends support of the police action, *Leveto*, 258 F.3d at 166, we have upheld qualified immunity even while deciding that the action in question violates the Constitution. On the other hand, the plaintiff need not show that there is a prior decision that is factually identical to the case at hand in order to establish that a right was clearly established. "A right may be clearly established even if there is 'no previous precedent directly in point.'" *Id.* at 162 (quoting *Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989)).

The principal narrow question in this case is whether in 1999, when these searches occurred, it was clearly established that police could not broaden the scope of a warrant with an unincorporated affidavit. We think that a review of the cases indicates that it was.

We begin with the settled proposition that the Fourth Amendment "prevents the seizure of one thing under a warrant describing another." *Marron*, 275 U.S. at 196. That is both uncontroverted and long established. As we observed above, a warrant may be modified by an affidavit when it is expressly incorporated by reference. We so held as early as our 1982 decision in *United States v. Johnson*, 690 F.2d at

64-65. Pennsylvania cases agree. *See Commonwealth v. Wilson*, 631 A.2d 1356, 1358 (Pa. Super. Ct. 1993).[9] But there is no express incorporation here.

What is significant is that the officers can point to no precedent that allowed an unincorporated affidavit to *expand* a search warrant. Although there are decisions that allow unincorporated affidavits to *clarify* or *narrow* overbroad warrants, we have explained at considerable length why these are a totally different matter. This is not an arcane or legalistic distinction, but a difference that goes to the heart of the constitutional requirement that judges, and not police, authorize warrants. An officer may reasonably rely on a magistrate's approval of an overbroad warrant because the officer normally should not be penalized for the magistrate's mistake. *See Massachusetts v. Sheppard*, 468 U.S. 981, 990 (1984); *U.S. v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty Seven Cents*, 307 F.3d 137, 152 (3d Cir. 2002). But there is no reasonable basis for an officer to exceed the scope of a warrant just because he asked for broader search authority in the affidavit. In the latter instance, the officer has not relied on, but has disregarded, the magistrate's judgment.

Our decision is fully consistent with the Supreme Court's decision in *Groh*. There, considering a warrant that failed to specify items to be seized in a house that was being searched, the Court dismissed the contention that omission of this description was not clearly

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[9] *Wilson* specifically held that reference to all persons present in an affidavit cannot be relied upon where it is not referenced in the warrant: "[T]he issuing authority neither authorized nor found probable cause for an 'all persons present' warrant. This is clear from a reading of the warrant. The only reference to such a warrant appears in the affidavit; the warrant itself does not appear to have granted the request." 631 A.2d at 1358.

unconstitutional, or a good faith error. Rather, the Court stated: "[A]s we observed in the companion case to *Sheppard*, 'a warrant may be facially deficient – *i.e.*, in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid.'" *Groh*, 540 U.S. at ___, slip op. at 13 (quoting *Leon*, 468 U.S. at 923). The flaw here was every bit as manifest as the omission in the warrant in *Groh*.

Finally, even if an exception to the warrant requirement did apply, it is clear that the search of Jane and Mary Doe for evidence had to be based on probable cause, and not on a generalized concern that those present at a search might hide evidence. That principle was established as early as 1979. *Ybarra*, 444 U.S. at 94-96.

Searching Jane and Mary Doe for evidence beyond the scope of the warrant and without probable cause violated their clearly established Fourth Amendment rights. Accordingly, we will affirm the decision of the District Court rejecting qualified immunity for the searches, and remand the case for further proceedings consistent with this opinion.

Doe v. Groody

No. 02-4532

ALITO, Circuit Judge, dissenting:

I would reverse the order of the District Court and direct that summary judgment be entered in favor of the defendants. First, the best reading of the warrant is that it authorized the search of any persons found on the premises. Second, even if the warrant did not contain such authorization, a reasonable police officer could certainly have read the warrant as doing so, and

therefore the appellants are entitled to qualified immunity.

I.

Search warrants are "normally drafted by nonlawyers in the midst and haste of a criminal investigation." *United States v. Ventresca*, 380 U.S. 102, 108 (1965). Consequently, they are to be read "in a commonsense and realistic fashion." *Id.* Here, the "commonsense and realistic" reading is that the issuing magistrate intended to authorize a search of all the occupants of the premises and that the warrant did so. Five points are important to keep in mind.

First, there is no doubt that the search warrant application sought permission to search all occupants of the premises. Indeed, the affidavit made this request in three separate paragraphs. Paragraph 17, after asking for authorization to search John Doe's home and car, added:

> *The search should also include all occupants of the residence* as the information developed shows that [John Doe] has frequent visitors that purchase methamphetamine. These persons may be on the premises at the time of the execution of the search warrant and may attempt to conceal controlled substances on their persons.

App. 498a (emphasis added).

Paragraph 20 reiterated that request:

> *This application seeks permission to search all occupants of the residence* and their belongings to prevent the removal,

> concealment, or destruction of any evidence requested in this warrant.

And paragraph 21 repeated the request a third time:

> As a result of the information developed, your affiant requests that a search warrant for methamphetamine and other controlled substances, drug paraphernalia, drug records, monies, proof of residence/ownership, documents, photographs, and weapons be issued for 618 Center St. Ashland, Pa., the residence of [John Doe] *and all occupants therein.*

App. 498a (emphasis added).

Second, the affidavit also clearly attempted to establish probable cause to search all occupants of the premises. The two affiants, who had background and training in drug cases, stated that, in their experience, drug dealers, when faced with "impending apprehension," often give evidence to other persons present on the premises in the hope that "said persons will not be subject to search when police arrive" and that this will "prevent the discovery of said items." *See* App. 494a.

Third, the warrant as drafted was intended to authorize a search of all persons on the premises. The warrant was drafted by the officers who applied for the warrant and was typed by one of those officers. App. 348a. Since the officers were seeking permission to search all occupants of the premises, they obviously intended for the draft warrant that they submitted to the magistrate to authorize the search of such persons.

Fourth, the warrant expressly incorporated the affidavit with respect to the issue that was most critical to the request to search all occupants, *viz.*, the issue of probable cause. While probable cause to search premises does not necessarily provide probable cause to search every person who is found on the premises, *see Ybarra v. Illinois*, 444 U.S. 85 (1979), *if* there is probable cause to believe that all of the persons found on the premises possess on their persons either contraband or evidence of a crime, there is no reason why a warrant authorizing a search of all such persons should not be issued. In this case, as noted, the affidavit submitted in support of the warrant application claimed that there was probable cause to search all such persons, and the warrant expressly incorporated that claim.

Fifth, after the warrant and affidavit were reviewed by the District Attorney's office and presented to a magistrate, the magistrate carefully reviewed these documents and signed the warrant without alteration.

Under these circumstances, the "commonsense and realistic" reading of the warrant is that it authorized a search of all occupants of the premises. It seems quite clear that the magistrate intended to authorize a search of all occupants of the premises. As noted, the application repeatedly requested such authorization and set out facts that the officers (and presumably the District Attorney's office) regarded as establishing probable cause. The warrant indisputably incorporated the affidavit with respect to the issue of probable cause, and the magistrate signed the warrant without alteration. The only reasonable inference is that the magistrate agreed with the affidavit that there was probable cause to search all occupants of the premises and that the magistrate intended to authorize such a search. The magistrate must have understood that the officers, who had drafted the warrant, believed that the

warrant, if signed, would give them authorization to carry out a search of the scope specified in the application, *viz.*, a search of "all occupants." As a result, the magistrate surely would not have signed the warrant without modification if the magistrate had not wished to confer that authority.

The majority, however, raises a formal objection to the warrant. The majority contends that the warrant unambiguously limits the persons to be searched to John Doe alone. In reaching this conclusion, the majority relies on the entry that the officers placed in the box entitled "SPECIFIC DESCRIPTION OF PREMISES AND/OR PERSONS TO BE SEARCHED." App. 493a. In that box, the officers placed the name of John Doe, followed by his race, sex, date of birth, hair and eye color, and Social Security number. *Id.* The officers also included the address and a fairly detailed description of the premises. *Id.* This information more than filled the space allotted. *Id.*

At their depositions, both of the officers who signed the affidavit explained why they did not note in the box in question that the warrant authorized a search of all occupants of the premises. They stated that there simply was not room in that box and that the incorporation of the affidavit into the warrant (which was noted in the box entitled "PROBABLE CAUSE BELIEF IS BASED ON THE FOLLOWING FACTS AND CIRCUMSTANCES"[10]) was meant to provide a full description of the persons to be searched.[11]

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[10] The affidavit is also cross-referenced in the box entitled DATE OF VIOLATIONS." App. 498a.

[11] Officer Schaeffer testified that John Doe was mentioned in the box at issue because he "was the target," but Officer Schaeffer added: "As you can see, that box is filled. You can't include everything there." App. 402a. *See also id.* at 403a. He stated that the affidavit was "part of the search warrant and we include everything that we want in that

For present purposes, however, the majority attaches no significance to the entry in the box concerning probable cause. The majority takes the position that the only relevant entry is the one in the box entitled "SPECIFIC DESCRIPTION OF PREMISES AND/OR PERSONS TO BE SEARCHED." Because that entry does not refer to all occupants of the premises

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affidavit of probable cause . . . . It's impossible to fit everything we want in these little boxes they give us." *Id.* at 402-03a.

Officer Phillips gave a similar explanation:

> Q. Okay. You'll agree with me, sir, that on the face of the warrant it calls, under the heading "Specific Description of Premises and/or Persons to be Searched" that only individual named there is [John Doe], is that correct?
>
> A. That is correct. And the reason for that is there's not enough room in that block to indicate every possible name of individuals who might be in the residence to be searched. That's why we extended into the probable cause affidavit, just as the rest of the information is in the probable cause affidavit. It would not fit on the face sheet of this warrant.
>
> Q. So it's your testimony that the only reason that the words and other, "and other occupants of the residence" do not appear on the face of the search warrant is there's no room?
>
> A. There's no room to list all of the occupants who may have been in the residence at the time with, along with an explanation of what "other occupants" are, include visitors, family members.

App. at 353a.

and does not state that the affidavit is incorporated for the purpose of specifying the persons to be searched, the majority concludes that the warrant does not authorize a search of all such persons. The majority states that the "warrant has no ambiguous . . . terms on its face" and that it is therefore improper to look beyond the face of the warrant. Maj. Op. at 8.

I believe that the majority's analysis is flawed. First and most important, the majority employs a technical and legalistic method of interpretation that is the antithesis of the "commonsense and realistic" approach that is appropriate.[12]

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[12] The majority's mistaken approach is further exemplified by its suggestion that the affidavit does not actually state that, in the experience of the affiants, drug dealers "often hide drugs on family members and young children." Maj. Op. at 11. The pertinent paragraph of the affidavit states:

> This application seeks permission to search all occupants of the residence and their belongings to prevent the removal, concealment, or destruction of any evidence requested in this warrant. It is the experience of your co-affiants that drug dealers often attempt to do so when faced with impending apprehension and may give such evidence to persons who do not actually reside or own/rent the premises. This is done to prevent the discovery of said items in hopes that said persons will not be subject to search when police arrive.

The commonsense reading of this paragraph is that, in the experience of the affiants, drug dealers, when they are about to be arrested, often give contraband or incriminating evidence to other persons who are on the premises ("occupants") in the hope that these persons will not be searched. The majority notes that this passage does not literally state that "narcotics dealers often hide drugs on

Second, the face of the warrant here does not unambiguously restrict the persons to be searched to John Doe alone. As previously noted, the question whether occupants other than John Doe should be searched was closely tied (if not identical) to the question whether there was probable cause to search such persons, and the face of the warrant incorporated the affidavit with respect to the issue of probable cause. This incorporation, at the very least, creates a sufficient ambiguity to permit consideration of the affidavit and the circumstances surrounding the application.

For these reasons, I would hold that the warrant did in fact authorize a search of all persons on the premises, including Jane and Mary Doe.

The majority strives to justify its decision by invoking the Supreme court's recent decision in *Groh v. Ramirez*, No. 02-811 (Sup. Ct. Feb. 24, 2004), but *Groh* simply does not speak to the question that divides this panel, i.e., the degree of technical precision that should be demanded in determining whether a warrant adequately incorporates an attached application or affidavit.

In *Groh*, law enforcement officers submitted an application for a warrant to search a ranch for firearms, explosives, and records and later carried out a search for these items, but the warrant did not state that a search for such items was authorized *and did not incorporate the application. Id.* at 2. In addition, when the search was completed, the officers gave one of the owners of the ranch a copy of the warrant, "*but not a*

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family members and young children," but this is precisely the sort of technical, legalistic reading that is out of place in interpreting a search warrant or supporting affidavit.

copy of the application, which had been sealed." *Id.* at 3 (emphasis added). The Court held that the warrant was defective because it did not particularly describe the type of evidence sought. *Id.* at 5. However, the Court was careful to distinguish the case before it from a case in which a warrant incorporates another document that contains such a specification. *Id.* at 5-6. The Court wrote:

> We do not say that the Fourth Amendment forbids a warrant from cross-referencing other documents. Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant. . . . But in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been place under seal) accompany the warrant. Hence, we need not further explore the matter of incorporation.

Id. at 6.

My disagreement with the majority concerns the question whether the mode of incorporation in this case was adequate, and *Groh* does not speak to this question. *Groh* merely refers without elaboration to "appropriate words of incorporation." Slip Op. at 6. In my view, the appropriateness of "words of incorporation" is to be judged by the "commonsense and realistic" standard that is generally to be used in interpreting warrants. The majority, however, reads the warrant in this case almost as if it were a contract

subject to the doctrine of a contra proferentum. *Groh* does not justify such an approach.

II.

Even if the warrant did not confer such authorization, a reasonable officer certainly could have believed that it did, and therefore the defendants' motion for summary judgment based on qualified immunity should have been granted. *See Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). *See also, e.g., Saucier v. Katz*, 533 U.S. 194, 202 (2001). The appellants in this case did not exhibit incompetence or a willingness to flout the law. Instead, they reasonably concluded that the magistrate had authorized a search of all occupants of the premises where: (1) that is what the application sought; (2) the affidavit asserted that there was probable cause for such a search; (3) the warrant expressly incorporated the affidavit on the issue of probable cause, (4) the language of the warrant was drafted to confer authorization to search all occupants, and (4) the magistrate signed the warrant without modification. In light of the discussion of these points in part I of this opinion, it is unnecessary to address them further here.[13]

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[13] The plaintiffs argue that there was no probable cause to search them, but whether or not there was probable cause, when a warrant is issued, officers who execute the warrant are entitled to qualified immunity unless "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs*, 475 U.S. at 344-45. That high standard is not met here.

In sum, the District Court erred in denying the defendants' motion for summary judgment. I share the majority's visceral dislike of the intrusive search of John Doe's young daughter, but it is a sad fact that drug dealers sometimes use children to carry out their business and to avoid prosecution. I know of no legal principle that bars an officer from searching a child (in a proper manner) if a warrant has been issued and the warrant is not illegal on its face. Because the warrant in this case authorized the searches that are challenged – and because a reasonable officer, in any event, certainly could have thought that the warrant conferred such authority – I would reverse.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN DOE, et al.	:	
	:	
Plaintiffs	:	
	:	
v.	:	
	:	No. 4:CV-00-0356
JOSEPH GROODY, et al.,	:	(Judge McClure)
Defendants	:	

MEMORANDUM

BACKGROUND:

Plaintiffs John and Jane Doe, as parents and natural guardians of Mary Doe; Jane Doe in her own right; and Richard Doe commenced this action under 42 U.S.C. § 1983 against numerous defendants. The complaint is set forth in four counts. All counts arise from events that occurred during the March 6, 1998 execution of a search warrant by the Schuylkill County Drug Task Force (Task Force) on John Doe's residence. With the exception of Susan Jones, each individual named as a defendant in this case was a member of the Task Force at the time of the execution of the search warrant.

In Count One, Richard Doe alleges that Ashland, Pennsylvania Police Officer Joseph Groody and now-retired Frackville, Pennsylvania Police Officer Jack Shearn violated his Fourth Amendment right to be free from unreasonable searches and seizures and his Fourteenth Amendment due process rights when, just prior to the execution of the search warrant, they encountered him on the sidewalk across the street from the Doe residence, transported him to the residence, handcuffed him, and conducted a search of his person. In Count Two, Richard Doe alleges that the Pennsylvania Boroughs of Ashland, Schuylkill Haven,

and Frackville (collectively, the Boroughs), the Pennsylvania Office of the Attorney General Bureau of Narcotics Investigation and Drug Control (BNI), the Task Force, and the County of Schuylkill are liable for the actions of Groody and Shearn because they failed to ensure that police officers and Task Force members employ proper methods of search and seizure.

In Count Three, John and Jane Doe, as parents and legal guardians of Mary Doe, and Jane Doe in her own right allege that Groody, Ashland Borough Police Officer Michael Aulenbach, Ashland Borough Police Chief Adam Bernodin, Ashland Borough Meter Patrol Officer Susan Jones, Schuylkill Haven Borough Police Officer Robert Phillips, Schuylkill Haven Borough Police Officer Jeffrey Walcott, Schuylkill Haven Police Officer R.P. Schaeffer, Shearn, and BNI Narcotics Agent Robert Bruce violated Jane and Mary Doe's Fourth Amendment right to be free from unreasonable searches when, during the execution of the warrant, they caused Jane and Mary Doe to be subjected to a "strip search." In Count Four, plaintiffs allege that the Boroughs are liable for the actions of the individual defendants because they failed to institute any practice, procedure or guideline concerning the performance of strip searches.

Upon motion by BNI and by order of the court, the action was dismissed with concurrence of plaintiffs as to BNI. (Rec. Doc. No. 10.) In an August 2, 2000 order, the court ordered plaintiffs to effect proper service of original process as to the Boroughs, the Task Force, and the County of Schuylkill and to file proof of service on or before August 16, 2000; the court further ordered that failure to comply would result in dismissal of the complaint, without prejudice, as to those named defendants. (Rec. Doc. No. 43) Plaintiffs have filed proof of service of original process as to the Boroughs, but have failed to do so as to the Task Force and to the

County of Schuylkill. As a result, the complaint will be dismissed, without prejudice, as to defendants Task Force and County of Schuylkill for failure to prosecute and failure to comply with a court order.

By stipulation of counsel, Richard Doe has withdrawn all claims and counts. (Rec. Doc. No. 49.) Also by stipulation of counsel, all claims against Walcott, Schaeffer, and Aulenbach have been dismissed. (Rec. Doc. No. 50, 51, 52.)

Remaining as plaintiffs are John and Jane Doe, as parents and natural guardians of Mary Doe, and Jane Doe in her own right (plaintiffs). Remaining as defendants are Groody, Bernodin, Jones, Phillips, Shearn, and Bruce (collectively individual defendants or defendants),[14] and the Boroughs. Individual defendants have filed a motion for summary judgment on the Third Count of plaintiffs' complaint; the Boroughs have filed a motion for summary judgment on the Fourth Count of plaintiffs' complaint.

Plaintiffs have filed a motion for partial summary judgment as to liability. Plaintiffs have not restricted their motion to any particular defendants or claims. However, plaintiffs limited their supporting brief to the individual defendants. Plaintiffs are therefore deemed to have withdrawn their motion as to the Boroughs, or waived the argument, and we will construe plaintiffs' motion as having been filed only as to the Third Count of plaintiffs' complaint.

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[14] We note here that the names of some individual defendants are spelled differently on a number of documents. It seems that defense counsel is more likely to have access to the correct spelling of the names. Therefore, throughout this memorandum we spell individual defendants' names as they were spelled by defense counsel in individual defendants' motion for summary judgment (Rec. Doc. No. 55).

For the reasons that follow, we will grant individual defendants' motion on the Third Count of plaintiffs' complaint on the ground of qualified immunity as to Jones and Shearn and will deny it as to Groody, Bernodin, Phillips, and Bruce. We will grant plaintiffs' motion for partial summary judgment on the Third Count of plaintiffs' complaint as to Groody, Bernodin, Phillips, and Bruce and will deny it as to Jones and Shearn. We will grant the motion for summary judgment of Schuylkill Haven Borough and of Frackville Borough on the Fourth Count of plaintiffs' complaint and will deny the motion for summary judgment of Ashland Borough on the Fourth Count of plaintiffs' complaint.

DISCUSSION:

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case

> necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). "Summary judgment is appropriate only when the record could not lead a reasonable jury to find for the non-moving party." *Crissman v. Dover Downs Entertainment, Inc.*, 239 F.3d 357, 360-61 (3d Cir. 2001) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)).

The moving party bears the initial responsibility of stating the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. It can discharge that burden by " 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

"An issue [of fact] is 'genuine' only if a reasonable jury, considering the evidence presented, could find for the non-moving party." *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1043 (3d Cir. 1997) (quoting *Childers v. Joseph*, 842 F.2d 689, 693-94 (3d Cir. 1988)). Material facts are those which will affect the outcome of the trial under governing law. *Anderson*, 477 U.S. at 248. The court may not weigh the evidence or make credibility determinations. *Boyle v. County of Allegheny*, 139 F.3d 386, 393 (3d Cir. 1998) (citations omitted). "When a court is deciding a motion for summary judgment, 'inferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the

non-movant's must be taken as true'." *Carter v. Exxon Co. USA*, 177 F.3d 197, 202 (3d Cir. 2000) (quoting *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992)).

Once the moving party points to evidence demonstrating that no issue of material fact exists, the non-moving party has the duty to set forth specific facts showing that a genuine issue of material fact exists and that a reasonable fact finder could rule in its favor. *Ridgewood Bd. Of Educ. V. N.E.*, 172 F.3d 238, 252 (3d Cir. 1999) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "Speculation and conclusory allegations do not satisfy this duty." *Ridgewood*, 172 F.3d at 252 (citing *Groman v. Township of Manalapan*, 47 F.3d 628, 637 (3d Cir. 1995)). To that end, "a nonmoving party . . . cannot defeat summary judgment simply by asserting that a jury might disbelieve an opponent's affidavit [as to a material fact]." *Schoonejongen v. Curtiss-Wright Corporation*, 143 F.3d 120, 130 (3d Cir. 1998) (citations omitted).

II. STATEMENT OF RELEVANT FACTS

The facts in this matter are largely undisputed. However, the parties disagree about some of the factual details. We will, where necessary, view the facts and all inferences to be drawn from them in the light most favorable to the nonmoving party in our analysis of each motion.

On March 6, 1998, as a result of an investigation of John Doe for suspected drug activity, the Task Force executed a search warrant on his home. Phillips and Schaeffer had prepared the search warrant and an affidavit of probable cause. On the face sheet of the search warrant, the box labeled "Specific Description of Premises and/or Persons to be Searched" identified

John Doe and his home. The box labeled "Probable Cause Belief is Based on the Following Facts and Circumstances" directs the reader to "[s]ee affidavit of probable cause attached." (Pls.' Mot. Summ. J., Rec. Doc. No. 58, Ex. A.) Paragraphs 17 and 20 of the affidavit, which was attached to the search warrant, both sought to search "all occupants of the residence." (Pls.' Mot. Summ. J., Rec. Doc. No. 58, Ex. A ¶¶ 17, 20.) Phillips and Schaeffer presented the search warrant and affidavit to a Schuylkill County assistant district attorney for review. Thereafter, Phillips, the only officer who signed the affidavit of probable cause, presented the search warrant and affidavit to a Schuylkill County district justice for approval.

At the briefing held prior to the execution of the search warrant, Task Force officers had anticipated the presence of females in the Doe residence. Because there were no female members of the Task Force and because no local female law enforcement officer was available, Bernodin and Groody suggested that they could call upon Jones to conduct a search of any females. Jones had assisted Ashland Borough police officers in the past by taking photographs of female victims. Prior to March 6, 1998, Jones had not assisted the Task Force.

At the time of the execution of the search warrant, Jane and Mary Doe, John Doe's wife and minor child, were present in the home. Task Force officers decided to search the persons of Jane and Mary Doe for weapons and/or contraband. Bernodin sent Groody to pick Jones up at her home and bring her to the Doe residence. On the ride from Jones's home to the Doe residence, Groody instructed Jones to search Jane and Mary Doe for weapons or contraband and told her to check for bulges and lumps in their clothing.

Upon her arrival, Jones accompanied Jane and Mary Doe to a bathroom located on the second floor of the Doe residence to conduct the search. Jones instructed Jane and Mary Doe to empty their pockets. Jones then asked Jane and Mary Doe to lift their shirts, pull their bras away from their bodies, and turn around. Jones patted Jane and Mary Doe's front and back pockets. Finally, Jones instructed Jane and Mary Doe to drop their pants around their ankles and turn around. Upon completion of the search, Jones left the Doe residence and a Task Force officer escorted Jane and Mary Doe to the first floor, where they remained for the duration of the search of the residence.

III. § 1983

Section 1983 provides for a cause of action against persons "who, under color of any statute ... of any State ... subject [ ] ... any citizen ... to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983; *see also, Wyatt v. Cole*, 504 U.S. 158, 161 (1992). "To state a claim under § 1983, a plaintiff must show that the defendant, through conduct sanctioned under the color of state law, deprived her of a federal constitutional or statutory right." *Gruenke v. Seip*, 225 F.3d 290, 298 (3d Cir. 2000).

IV. SUMMARY JUDGMENT MOTIONS: INDIVIDUAL DEFENDANTS AND PLAINTIFFS

Plaintiffs' complaint specifies that Jones conducted the search; that Bernodin, Shearn, and/or Phillips directed Jones to conduct the search; and that Groody, Bernodin, Jones, Phillips, Shearn, and Bruce were aware of the search and took no action to prevent it from continuing. Plaintiffs claim that each defendant violated Jane and Mary Doe's Fourth and Fourteenth Amendment rights related to each defendant's role in

the allegedly unlawful search. Defendants assert that (1) because the right to be free from unreasonable searches is protected by the Fourth Amendment, plaintiffs may not assert a Fourteenth Amendment substantive due process violation; (2) because Jane and Mary Doe were included as "all occupants" in the probable cause affidavit accompanying the search warrant for the Doe residence, defendants' actions in the search of the women did not amount to a violation of their Fourth Amendment rights; and (3) even if defendants did violate Jane and Mary Doe's constitutional rights, they are entitled to qualified immunity.

In the context of a § 1983 claim, we are required to examine the issue of qualified immunity before we may reach the underlying merits of plaintiffs' claim. *See Gruenke*, 225 F.3d at 298-99. We therefore begin our analysis with defendants' claim of qualified immunity.

A. QUALIFIED IMMUNITY

Qualified immunity is an "entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). It acts as a shield from liability for government officials performing discretionary functions. Officials are entitled to qualified immunity where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Sharrar v. Felsing*, 128 F.3d 810, 826 (3d Cir. 1997) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (internal quotation marks omitted).

Claims of qualified immunity must be evaluated using a two-step process. *Bennett v. Murphy*, 274 F.3d 133, 136 (3d Cir. 2001). "[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged ... ." *Saucier v. Katz*, 533 U.S. 194,

200 (2001). At summary judgment, we make this inquiry using the summary judgment evidence as opposed to merely the allegations in the complaint. *See, e.g., In re City of Philadelphia Litigation*, 158 F.3d 711, 719 (3d Cir. 1998). "If no constitutional right would have been violated were the allegations established," there is no need for further inquiry, and the claim of qualified immunity must be denied. *Saucier*, 533 U.S. at 201.

However, "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.* The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202 (citation omitted). Whether a right is clearly established and whether an officer acted reasonably are questions of law to be decided by the court. *Bartholomew v. Pennsylvania*, 221 F.3d 425, 428 (3d Cir. 2000).

Violation of Constitutional Right

Plaintiffs claim that each defendant violated Jane and Mary Doe's Fourth Amendment right to be free from unreasonable searches by either directing, performing, or failing to prevent the searches of the persons of Jane and Mary Doe. Plaintiffs also claim that each defendant violated Jane and Mary Doe's Fourteenth Amendment substantive due process rights in that their direction of, performance of, or failure to prevent the searches of the persons of Jane and Mary Doe amounted to conduct that would shock the conscience of the community. Defendants point out, and we agree, that because plaintiffs' claims arise under a specific constitutional amendment, we may not analyze them under substantive due process.

The Supreme Court has made clear that when a "particular Amendment provides an explicit textual source of constitutional protection ... that Amendment, not the more generalized notion of substantive due process, must be the guide" for the analysis of a claim of a violation of that constitutional right. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)) (internal quotation marks omitted). Plaintiffs' claims relate to the right to be free from unreasonable searches, a right clearly conferred by the Fourth Amendment, which provides, in part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated." U.S. CONST. amend. IV.

Plaintiffs argue that, in addition to their right to be free from unreasonable searches, their claims are based upon an invasion of their Fourteenth Amendment privacy rights. Specifically, plaintiffs cite to John and Jane Doe's "legitimate expectations that their familial relationship will not be subject to unwarranted state intrusion." (Pls.' Br. Opp'n Defs.' Mot. Summ. J., Rec. Doc. No. 71 at 6.) However, plaintiffs make no claim in their complaint of unwarranted state intrusion on their familial relationship. We therefore decline to address this argument. We will, under *Albright*, analyze plaintiffs' claims under the Fourth Amendment right to be free from unreasonable searches.

Plaintiffs rely on Pennsylvania Rule of Criminal Procedure 205 (former Rule 2005) in their argument that there are no record facts that would justify a search of "all occupants" of the Doe residence. Rule 205 provides, in relevant part, that "[e]ach search warrant ... shall ... name or describe with particularity the person or place to be searched." PA.R.CRIM.P. 205(3). Defendants counter that to the extent

Pennsylvania may interpret the Fourth Amendment differently than the federal courts, the federal courts' interpretation of the constitutional provision is binding. We find it unnecessary to address plaintiffs' challenge to the "all occupants" language used in the affidavit of probable cause. This is so because we find that the affidavit of probable cause was not incorporated by reference into the search warrant as to the "Specific Description of Premises and/or Persons to be Searched."

A search warrant must state probable cause and describe with particularity "the place to be searched, and the persons or things to be seized." U.S. CONST. AMEND. IV; *Bartholomew*, 221 F.3d at 428. In their motion, defendants correctly note that when determining whether a search warrant is constitutional, one must read the search warrant as a whole. (Defs.' Br. Supp. Mot. Summ. J., Rec. Doc. No. 64 at 10 (citing *Andresen v. Maryland*, 427 U.S. 463, 479-82 (1976).) Moreover, "[w]hen a warrant is accompanied by an affidavit that is incorporated by reference, the affidavit may be used in construing the scope of the warrant." *Bartholomew*, 221 F.3d at 428 (quoting *United States v. Johnson*, 690 F.2d 60, 64-5 (3d Cir. 1982)).

It is uncontested that the affidavit of probable cause was attached to the search warrant for the search of the Doe residence. (Defs.' Stmt. Mat. Facts, Rec. Doc. No. 56, ¶ 12; Pls.' Resp. Stmt. Mat. Facts, Rec. Doc. No. 70, ¶ 12.) It is also uncontested that paragraphs 17 and 20 of the affidavit sought to search "all occupants of the residence." (Defs.' Stmt. Mat. Facts, Rec. Doc. No. 56, ¶¶ 16, 17; Pls.' Resp. Stmt. Mat. Facts, Rec. Doc. No. 70, ¶¶ 16, 17.) However, despite the uncontested fact that "[t]he face sheet of the search warrant referred to the attached affidavit and referenced that additional papers were attached," we find that the affidavit was not incorporated by reference as to the "Specific

Description of Premises and/or Persons to be Searched." (Defs.' Stmt. Mat. Facts, Rec. Doc. No. 56 ¶ 13; Pls.' Resp. Stmt. Mat. Facts, Rec. Doc. No. 70, ¶ 13.)

The affidavit of probable cause is indeed referenced on the face of the search warrant for the Doe residence. However, none of the references relates to the "Specific Description of Premises and/or Persons to be Searched." First, within the box designated for a description of the violation, there is a smaller box labeled "Date of Violation." The affiants refer the reader to the affidavit, stating "Numerous see attached affidavit [ ]." (Pls.' Mot. Summ. J., Rec. Doc. No. 58, Ex. A.) In the box labeled "Probable Cause Belief is Based on the Following Facts and Circumstances," the affiants again refer the reader to the affidavit, stating "See affidavit of probable cause attached." (*Id.*) Also in the box designated for probable cause belief, the affiants indicate that there are additional sheets attached. (*Id.*)

However, the affiants make no reference to the affidavit in the box labeled "Specific Description of Premises and/or Persons to be Searched." That box does contain the name, Social Security Number, and description of John Doe as well as the address and description of the Doe residence. Defendants claim that the box was not big enough to fit all of the necessary information to include other persons to be searched. We find this reasoning inadequate to excuse defendants' failure to incorporate the search warrant by reference as to the persons to be searched. Defendants could have, for example, included only a reference to the affidavit in that box and described Doe, his residence, and "all other occupants" in the affidavit. Because the individual defendants failed to incorporate by reference the affidavit of probable into the search warrant, the search of the persons of Jane and Mary Doe was not authorized by the search warrant.

To justify a warrantless search of the women, defendants must show that they had probable cause to conduct the search. The record evidence indicates that Task Force officers decided to search the persons of Jane and Mary Doe solely because of their presence at the Doe residence. (*See* Phillips Dep., Rec. Doc. No. 58, Ex. B at 39-40; Groody Dep., Rec. Doc. No. 58, Ex. D at 28; Bernodin Dep., Rec. Doc. No. 58, Ex. E at 24-25; Shearn Dep., Rec. Doc. No. 58, Ex. C at 53.) Given that Supreme Court has found that "a person's mere propinquity to others independently suspected of criminal activity does, without more, give rise to probable cause to search that person," we find that Jane and Mary Doe's mere presence in the home of an individual suspected of committing various drug violations does not, by itself, justify the search of the women conducted at the hands of the Task Force. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (citation omitted).

Defendants argue that they reasonably believed that Jane and Mary Doe knew of John Doe's drug activity and that based upon their experience, family members of drug dealers sometimes secrete evidence to prevent its discovery. We find that this belief does not amount to a demonstration of a fair probability that contraband or evidence of a crime would be found on the person of Jane or Mary Doe. "[A] search or seizure of a person must be supported by probable cause particularized with respect to that person." *Ybarra*, 444 U.S. at 91. There is no mention of any family member anywhere on the face of the search warrant or in the affidavit of probable cause, much less a statement of particularized probable cause as to Jane or Mary Doe. (Pls.' Mot. Summ. J., Rec. Doc. No. 58, Ex. A.)

Further, there is no record evidence that indicates either Jane or Mary Doe was acting in a manner that would cause officers to think that they were hiding

evidence, so as to give rise to the exigent circumstance of the removal or destruction of evidence. At the time Jones arrived to conduct the search, Jane and Mary Doe were seated in the living room of the Doe residence under the observation of police officers. (*See e.g.*, Bernodin Dep., Rec. Doc. No. 58, Ex. E at 19.) We find, then, that based upon review of the record evidence, the search of the persons of Jane and Mary Doe was not accompanied by probable cause particularized as to Jane and Mary Doe, nor did it fall under the exigent circumstances exception to the warrant requirement.

Inasmuch as the affidavit of probable cause was not incorporated on the face of the search warrant of the Doe residence as to the "Specific Description of Premises and/or Persons to be Searched" and defendants have failed to otherwise demonstrate that they had probable cause to search the persons of Jane and Mary Doe, we find that plaintiffs have sufficiently made out a Fourth Amendment violation for the purposes of our qualified immunity inquiry.

Clearly Established

Having found that, when viewing the evidence in the light most favorable to plaintiffs, a constitutional violation may be made out, we now turn to whether plaintiffs' rights were clearly established such that defendants should have known that their actions were in violation of the law. Because qualified immunity must operate "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful," the issue we must determine here as to each individual defendant is whether a reasonable officer could have believed the search of Jane and Mary Doe was lawful in light of clearly established law and the information that each defendant possessed at the time of the search. Saucier, 533 U.S. at 206.

As explained above, it is clear that an officer may not conduct a warrantless search of a person absent probable cause. In their argument that they are entitled to qualified immunity, defendants rely on the fact that "a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting [a] search." *United States v. Leon*, 468 U.S. 897, 922 (1984) (internal quotation marks and citation omitted). However, an "officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues" must nevertheless be objectively reasonable. *Id.* It is clear that the search warrant and affidavit for the search of the Doe residence does not establish probable cause particularized with respect to Jane Doe, Mary Doe, or any family member of John Doe. We believe that during the execution of a search warrant, no reasonable officer would rely for a search of the persons of family members present at the time of the warrant on a warrant such as the one defendants seek to rely on in the instant case.

We find that Groody, Bernodin, Phillips, and Bruce are not entitled to qualified immunity because each played a direct role in the warrantless searches of the persons of Jane and Mary Doe. Bernodin directed Groody to pick Jones up at her home and bring her to the Doe residence to search the women; Groody instructed Jones to search the women; Phillips prepared the defective search warrant and affidavit; and Bruce acted as Task Force coordinator. Though it is not clear whether all Task Force officers had read the search warrant and affidavit (*See* Bernodin Dep., Rec. Doc. No. 58, Ex. E at 10; Bruce Dep., Rec. Doc. No. 57, Attach. E at 17), "[o]fficers conducting a search should read the warrant or otherwise become fully familiar with its contents." *Marks v. Clarke*, 102 F.2d 1012, 1030 (9th Cir. 1996) (emphasis and citation omitted). No reasonable officer familiar with the contents of the

search of the Doe residence would have authorized or directed a search of the persons of Jane and Mary Doe. Plaintiffs' rights were clearly established, and Groody, Bernodin, Phillips, and Bruce should have known that their conduct was in violation of the law.

We find that Jones is entitled to qualified immunity. Though Jones actually conducted the search, there is no evidence to support a finding that she had reason to know that her conduct was in violation of the law. We find that a reasonable meter patrol officer with no police training would have no reason to question her supervisor, the chief of police in this case, when he directs her to conduct a search of two women at the site of a search warrant execution.

We find that Shearn is entitled to qualified immunity. It is unclear to us why Shearn is included as an individual defendant, inasmuch as the Third Circuit has made clear that "[a] defendant in a [§ 1983] action must have personal involvement in the alleged wrongs." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3d Cir. 1997) (emphasis and citation omitted). Shearn knew that Jones was at the Doe residence "to search the women" (Shearn Dep., Rec. Doc. No. 58, Ex. C at 53.) However, Shearn had no personal involvement in the searches, and he played no part in securing the search warrant (Shearn Dep., Rec. Doc. No. 58, Ex. C at 18.) Plaintiffs' complaint alleges that Shearn directed Jones to conduct the search and that he was aware of the search and took no action to prevent it from continuing. We find that Shearn did not direct Jones to search and that he was not in a position to prevent the search. During the search of Jane and Mary Doe, Shearn stood at the bottom of the stairs (Shearn Dep., Rec. Doc. No. 58, Ex. C at 19.) Further, "a person who fails to act to correct the conduct of someone over whom he or she has no supervisory authority cannot fairly be said to have 'acquiesced' in

the latter's conduct." *Robinson*, 120 F.3d at 1294. Shearn had no supervisory authority with respect to the Doe search warrant; he therefore cannot be found to have acquiesced in the conduct of Groody, Bernodin, Bruce, or Jones. A reasonable officer in Shearn's position would not have acted any differently than Shearn did in the instant case.

B. SUMMARY JUDGMENT

As discussed above, the affidavit of probable cause was not incorporated on the face of the search warrant of the Doe residence as to the "Specific Description of Premises and/or Persons to be Searched" and defendants have failed to otherwise demonstrate that they had probable cause to search the persons of Jane and Mary Doe. It is for these reasons we find that there is no record evidence upon which a reasonable jury could rely to find that defendants did not violate Jane and Mary Doe's Fourth Amendment right to be free from unreasonable searches. Because we have found that defendants Jones and Shearn are entitled to qualified immunity, we will grant defendants' motion for summary judgment on the Third Count of plaintiffs' complaint as to Jones and Shearn on that ground. Because we have found that defendants Groody, Bernodin, Phillips, and Bruce are not entitled to qualified immunity, we will deny defendants' motion for summary judgment on the Third Count of plaintiffs' complaint as to Groody, Bernodin, Phillips, and Bruce. Consequently, we will deny plaintiffs' motion for partial summary judgment on the Third Count of plaintiffs' complaint as to Jones and Shearn and will grant plaintiffs' motion for partial summary judgment on the Third Count of plaintiffs' complaint as to Groody, Bernodin, Phillips, and Bruce.

V. SUMMARY JUDGMENT MOTION; THE BOROUGHS

In their motion for summary judgment, the Boroughs claim plaintiffs have failed to show that any Borough policy resulted in harm to plaintiffs or that any Borough policy was executed by a police officer acting on behalf of the Borough at the time of the alleged harm. We agree that plaintiffs have failed to show that any Schuylkill Haven or Frackville Borough policy resulted in harm to Jane and Mary Doe. We also agree that plaintiffs have failed to show that any Borough policy was executed by a police officer acting on behalf of the Borough at the time of the alleged harm. We believe, however, that a review of the record in this case indicates that a reasonable jury could find that Jones acted on behalf of Ashland Borough and that she implemented an unconstitutional Borough policy set by the Ashland Borough chief of police when she conducted a search of the persons of Jane and Mary Doe.

A municipality may be held liable under § 1983 for alleged unconstitutional acts that implement an official policy, practice, or custom. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). However, a municipality may not be held liable under § 1983 on a *respondeat superior* theory. *Id.* at 691. That is, § 1983 does not "impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.* at 692. In order to show municipal liability, then, a plaintiff must "identify the challenged policy, attribute it to the city itself, and show a causal link between execution of the policy and the injury suffered." *Losch v. Borough of Parkesburg*, 736 F.2d 903, 910 (3d Cir. 1984) (citation omitted).

Plaintiffs cite several Borough "customs, practices and procedures" that they claim "directly resulted in the illegal and unlawful strip searches of Jane Doe and Mary Doe." (Complaint, Rec. Doc. No. 1 at ¶¶ 53, 54.)

In their motion, the Boroughs distinguish plaintiffs' cited customs, practices, and procedures concerning the administration of the Task Force from those concerning the law enforcement practices of the Boroughs. We will do the same.

A. ADMINISTRATION OF THE TASK FORCE

Plaintiffs identify the following as Borough customs, practices, and procedures concerning the administration of the Task Force that they claim resulted in the allegedly unlawful and unreasonable search of Jane and Mary Doe:

> Failing to establish proper and effective command and supervisory practices for law enforcement officers who were members of the Schuylkill County Drug Task Force; [and]
>
> Failing to ensure that the law enforcement officers that were members of the Schuylkill County Drug Task Force were properly trained in lawful and proper methods of search and seizure.

(Complaint, Rec. Doc. No. 1 at ¶ 53 (b), (c).)

The Boroughs assert that by criticizing these policies, plaintiffs assume that the Boroughs had control over the manner in which the Task Force operated and that they should have implemented policies to address alleged deficiencies in Task Force practices. The Boroughs claim, and we agree, that there are no record facts upon which a reasonable jury could base a finding that they were responsible to set and enforce Task Force policies.

Plaintiffs have produced no evidence that the Boroughs are charged with establishing proper and effective command and supervisory practices for Task Force officers. Bruce, as a BNI narcotics agent, acts as coordinator of the Task Force. Bruce coordinates Task Force efforts, approves and disburses funds for Task Force activities, checks Task Force paperwork, and accompanies Task Force officers on selected enforcement operations. (See Bruce Dep., Rec. Doc. No. 57, Attach. E at 5-6) Bruce is not employed by any Schuylkill county municipality. When asked about BNI procedure for Task Force activities, Bruce explained the following:

> [Task Force officers] would call me and tell me what they wanted to do. Sometimes they had money already on hand that I had issued to them. Sometimes they didn't. Sometimes I had to issue money. They would have told me how many hours they thought that they needed. They would tell me what they were going to do, how they were going to do it and who was going to do it. And depending on the situation, it was a yes or a no.

(*Id.* at 9-10.) Bruce further testified that his role as Task Force coordinator "makes [him] the boss." (*Id.* at 22.) We find that this testimony indicates clearly that Bruce, and not any Borough, is charged with Task Force supervision. Thus, no reasonable jury could find that the Boroughs' failure to establish Task Force command and supervisory practices led to the allegedly unlawful search of Jane and Mary Doe.

There is likewise no record evidence that the Boroughs are responsible for training Task Force officers in search and seizure. Each Task Force officer

had gone through 40 hours of mandatory specialized training, including training in search and seizure, before participating in any Task Force activity. (*See, e.g.*, Bernodin Dep., Rec. Doc. No. 57, Attach. G at 6; Shearn Dep., Rec. Doc. No. 57, Attach. D at 9.) The mandatory training was provided by the Attorney General's Office, not by the Boroughs. (*See* Groody Dep., Rec. Doc. No. 57, Attach. C at 4.)

"To survive summary judgment on a failure to train theory, [a plaintiff] must present evidence that the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the *policymaker's* failure to respond amounts to deliberate indifference." *Brown v. Muhlenberg Township*, 269 F.3d 205, 216 (3d Cir. 2001) (citing *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)) (emphasis added). Having found that there is no basis for a finding that the Boroughs are responsible for establishing Task Force command and supervisory practices, we believe it follows that there is no basis for a finding that the Boroughs are responsible for responding to any alleged deficiency in Task Force training. Under *Brown* and *Canton*, then, plaintiffs' theory that the Boroughs failed to ensure that Task Force officers were trained in search and seizure must fail.

B. BOROUGH LAW ENFORCEMENT

In addition to the Borough policies concerning the administration of the Task Force, plaintiffs identify several Borough policies concerning searches in general as well as strip searches that they allege led to the violation of Jane and Mary Doe's Fourth Amendment rights, as follows:

> Permitting law enforcement officers in their employ and under their supervision

> to regularly conduct unlawful and unreasonable searches in violation of the Fourth Amendment;
>
> Failing to have any procedure, practice or guidelines in effect concerning the performance of strip searches of persons present when a search was conducted pursuant to a search warrant, when such persons were not named in the search warrant;
>
> Failing to have any practice, procedure, or guidelines in effect concerning the performance of strip searches generally;
>
> Failing to have any practice, procedure, or guidelines in effect concerning the performance of strip searches of minors;
>
> Permitting law enforcement officers in their employ, and under their supervision, to conduct strip searches of individuals, in the absence of probable cause or exigent circumstances; [and]
>
> In overlooking, ignoring, or permitting to go without punishment, previous instances where law officers in their employ, and under their supervision, conducted unlawful and unreasonable strip searches.

(Complaint, Rec. Doc. No. 1 at ¶ 53 (a), (d), (e), (f), (g), (h).)

We note that it is highly unusual for a plaintiff to allege that a lack of official policy has led to a violation of his constitutional rights. However, plaintiffs claim

that a municipality's "failure ... to set a policy governing such a highly intrusive police action [as a strip search] can render [its] actions as culpable as if they had a policy permitting unreasonable searches themselves." (Pls.' Br. Opp'n to Def. Boroughs' Mot. Summ. J., Rec. Doc. No. 74 at 3 (quoting *Timberlake v. Benton*, 786 F.Supp. 676, 696 (M.D. Tenn. 1992)).) In *Timberlake*, the court found a city liable for the actions of its police officers who, while acting as members of a drug task force, had conducted investigatory strip searches of persons not in custody. The court found that noncustodial strip searches had been conducted both by the municipal police and by members of the drug task force on numerous occasions. *Timberlake*, 786 F.Supp. at 696. Although there was no official municipal policy for noncustodial investigatory strip searches, the court called the practice an "unwritten policy," and denied the municipality's motion for summary judgment. *Id.*

In contrast to the facts in *Timberlake*, there is nothing in the record in this case that indicates that any Borough police officer or any Task Force member has ever conducted a strip search. Further, there is no record evidence that any Schuylkill Haven or Frackville Borough policy concerning searches (or lack thereof) was unreasonable or infringed on plaintiffs' constitutional rights. It is clear that the execution of the search warrant at the Doe residence was a Task Force operation. (*See* Groody Dep., Rec. Doc. No. 57, Attach. C at 7 (explaining that prior to March 6, 1998, the Task Force took over the investigation of John Doe from Ashland Borough).) It is also clear, as explained above, that Task Force officers were following Task Force policy at the time of the search warrants. We therefore find that there is no basis upon which a reasonable jury could conclude that there was any Schuylkill Haven or Frackville Borough policy that led to the alleged violation of Jane and Mary Doe's Fourth

Amendment right to be free from unreasonable searches.

We find that there is a genuine issue of material fact as to the liability of Ashland Borough. There is no record evidence that Ashland Borough permitted its police officers "regularly" to conduct unlawful searches. We think, however, that a reasonable jury could find that although he was acting as a Task Force officer at the time, Bernodin, Ashland Borough police chief, created Borough policy when he authorized a civilian employee to conduct an allegedly unlawful search.

The Supreme Court has found that a single action by a municipal policymaker may constitute a sufficient basis on which to impose municipal liability under § 1983. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). To be considered a "policymaker," a municipal official "must also be responsible for establishing final government policy [with respect to the action ordered]." *Id.* at 483.

It was Bernodin who sent Groody to pick Jones up at her home and ask her to search Jane and Mary Doe. (Groody Dep., Rec. Doc. No. 57, Attach. C at 37.) It is not clear whether Bernodin, as Ashland Borough police chief, was responsible for establishing final Borough policy with respect to searches. Moreover, Jones testified that Groody, not Bernodin, instructed her as to how to search Jane and Mary Doe and that she had no discussions concerning the results of the search with anyone other than Groody. (Jones Dep., Rec. Doc. No. 57, Attach. H at 23.) However, Bernodin was "in charge of" Jones, a civilian employee of the Ashland Borough police department. (Bernodin Dep., Rec. Doc. No. 57, Attach. G at 12.)

In addition, the Task Force did not pay Jones for the time she spent searching the persons of Jane and Mary

Doe. Rather, Jones testified that in exchange for having performed the search, Ashland Borough gave her two extra hours off. (Jones Dep., Rec. Doc. No. 57, Attach. H at 22.) In contrast, police officers who participated in Task Force activities were not paid for their services by their individual Borough employers. The compensation for Task Force activity was in addition to compensation for municipal activity. (*See, e.g.*, Shearn Dep., Rec. Doc. No. 57, Attach. D at 7.) Task Force compensation was included in each police officer's paycheck from the Borough that employed him, but the Attorney General's Office reimbursed each Borough for the number of hours its police officers spent on Task Force operations. (*See e.g.*, Groody Dep., Rec. Doc. No. 57, Attach. C at 5; Bruce Dep., Rec. Doc. No. 57 Attach. E at 5-6.) Finally, Jones testified that she was hesitant to perform the search, and that "[i]t's something that you don't really do unless you really have to." (Jones Dep., Rec. Doc. No. 57, Attach. H at 26.)

Though Jones ultimately acted at the direction of Groody, a Task Force officer on a Task Force operation, we believe that there is sufficient evidence for a reasonable jury to find that Jones was present at the Doe residence on behalf of Ashland Borough. Moreover, if a reasonable jury were to find that Jane and Mary Doe's constitutional rights were violated, we believe that the same reasonable jury could find that, in directing that Jones be picked up at her home and asked to search Jane and Mary Doe, and in giving Jones two hours off in exchange for having performed the search on Jane and Mary Doe, Bernodin created Borough policy allowing civilian police department employees to conduct unlawful searches. We therefore find that there is a genuine issue of material fact pertaining to the asserted liability of Ashland Borough.

The Boroughs also seek to base their motion on the good faith of the officers and the general proposition that a municipality cannot be liable under § 1983 unless an employee is also liable. We note that the Third Circuit has found, in the context of an alleged violation of substantive due process rights, that

> [a] finding of municipal liability does not depend automatically or necessarily on the liability of any police officer. ... The fact that the officer's conduct may not [shock the conscience] does not negate the injury suffered by the plaintiff as a result. If it can be shown that the plaintiff suffered that injury ... because the officer was following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 ... .

Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir. 1994). However, given that we have found that Ashland Borough Employees Groody and Bernodin are not entitled to qualified immunity for the violation of plaintiffs' Fourth Amendment rights, we find it unnecessary to address the Boroughs' argument or to attempt to apply the Third Circuit's reasoning in *Fagan* to a Fourth Amendment violation.

CONCLUSION:

For the reasons set forth above, the individual defendants' motion for summary judgment on the Third Count of plaintiffs' complaint on the ground of qualified immunity will be granted as to Jones and Shearn and denied as to Groody, Bernodin, Phillips, and Bruce. Plaintiffs' motion for partial summary judgment on the Third Count of plaintiffs' complaint will be granted as to

Groody, Bernodin, Phillips, and Bruce and denied as to Jones and Shearn. The summary judgment motion of Schuylkill Haven Borough and Frackville Borough will be granted. The summary judgment motion of Ashland Borough will be denied. An appropriate order follows.

/s/ James F. McClure, Jr.
James F. McClure, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN DOE, et al.	:	
	:	
Plaintiffs	:	
	:	
v.	:	
	:	No. 4:CV-00-0356
JOSEPH GROODY, et al.,	:	(Judge McClure)
	:	
Defendants	:	

ORDER (#1)

December 2, 2002

For the reasons set forth in the accompanying memorandum,

IT IS ORDERED THAT:

1. Defendants Groody, Bernodin, Jones, Phillips, Shearn, and Bruce's Motion for Summary Judgment as to the Third Count of plaintiffs' complaint (Rec. Doc. No. 55) is granted in part and denied in part:

1.1. The motion is granted with respect to all claims against defendants Jones and Shearn, as set forth in the Third Count of plaintiffs' complaint (Rec. Doc. No. 1).

1.2. The motion is denied with respect to all claims against defendants Groody, Bernodin, Phillips, and Bruce, as set forth in the Third Count of plaintiffs' complaint (Rec. Doc. No. 1).

2. Plaintiffs' Motion for Partial Summary Judgment as to the Third Count of plaintiffs' complaint (Rec. Doc. No. 58) is granted in part and denied in part:

2.1. The motion is granted with respect to all claims against defendants Groody, Bernodin, Phillips, and Bruce, as set forth in the Third Count of plaintiffs' complaint (Rec. Doc. No. 1).

2.2. The motion is otherwise denied.

3. The clerk is directed to defer entry of final judgment as to the Third Count of plaintiffs' complaint in favor of defendants Jones and Shearn and against plaintiffs until further order of court upon disposition of the entire case.

4. The clerk is directed to defer entry of final judgment as to the Third Count of plaintiffs' complaint in favor of plaintiffs and against defendants Groody, Bernodin, Phillips, and Bruce until damages have been determined and until further order of court upon disposition of the entire case.

5. The Motion for Summary Judgment Submitted on Behalf of the Defendants, Borough of Ashland, Borough of Frackville, and the Borough of Schuylkill Haven as to the Fourth Count of plaintiffs' complaint (Rec. Doc. No. 54) is granted in part and denied in part:

5.1. The motion is granted with respect to all claims against defendants Borough of Frackville and Borough of Schuylkill Haven, as set forth in the Fourth Count of plaintiffs' complaint (Rec. Doc. No. 1).

5.2 The motion is denied with respect to all claims against defendant Borough of Ashland, as set forth in the Fourth Count of plaintiffs' complaint (Rec. Doc. No. 1).

6. The clerk is directed to defer entry of final judgment as to the Fourth Count of plaintiffs' complaint

in favor of defendants Borough of Frackville and Borough of Schuylkill Haven and against plaintiffs until further order of court upon disposition of the entire case.

7. Plaintiffs' complaint is dismissed, without prejudice, as to defendants Schuylkill County Drug Task Force and County of Schuylkill for failure to prosecute and failure to comply with a court order.

8. The remaining claims are as follows:

8.1. Claims under the Third Count as against individual defendants Groody, Bernodin, Phillips, and Bruce (trial limited to damages; liability has been established).

8.2. The claim under the Fourth Count as against Ashland Borough (trial as to both liability and damages; plaintiffs' motion for summary judgment on the Fourth Count is deemed withdrawn or waived).

9. A scheduling order will issue separately.

/s/ James F. McClure, Jr.
James McClure, Jr.
United States District Judge

Commonwealth of Pennsylvania

COUNTY OF Schuylkill

SS: **SEARCH WARRANT AND AFFIDAVIT**

Ptlm. R. P. Schaeffer Schuylkill County Drug Task force/Sch. Haven PD
Ptlm. Robert W. Phillips Schuylkill County Drug Task Force/Sch. Haven PD
(Name of Affiant) *(Police Department or address of private Affiant)* *(Phone No.)*

WARRANT CONTROL No. L 10110

DATE OF APPLICATION 03/06/98

INVENTORY No. F12078

sing duly sworn (or affirmed) before me according to law, deposes and says that there is probable cause believe that certain property is evidence of or the fruit of a crime or is contraband or is unlawfully possed or is otherwise subject to seizure, and is located at particular premises or in the possession of rticular person as described below.

NTIFY ITEMS TO BE SEARCHED FOR AND SEIZED *(be as specific as possible)*:
hamphetamine, a Schedule II controlled substance, monies, drug paraphernalia, drug records, of of residence/ownership, documents, photographs of drug activity and weapons.

CIFIC DESCRIPTION OF PREMISES AND/OR PERSONS TO BE SEARCHED *(Street and No., Apt. No., Vehicle, Safe Deposit Box, etc.)*:
chael A. McGinley W/M DOB-03/10/55 Brown hair, Brown eyes, SSN-176486694
Center St. Ashland, Pa. two story building w/an underground cellar, outside cement steps to ellar, 2nd flr. has 3 windows surrounded by light colored brick-other brick is dark lower flr. ~~side of the east side and 2 doors, front door another door in center of both windows.~~

E OF OWNER, OCCUPANT OR POSSESSOR OF SAID PREMISES TO BE SEARCHED *(If proper name is unknown, give alias and/or description)*:
chael A. McGinley

ATION OF *(Describe conduct or specify statute)*:
t 64 Pa. Controlled Susbtance, Drug Device and Cosmetic Act

DATE OF VIOLATION: Numerous see attached affidavitss

BABLE CAUSE BELIEF IS BASED ON THE FOLLOWING FACTS AND CIRCUMSTANCES:
ee affidavit of probable cause attached.

SUPERIOR DISTRICT JUSTICE
DISTRICT #21-3-03
Schuylkill County
My Commission Expires January 5, 2000

SHEARN
DEPOSITION EXHIBIT
2
Nov. 29, 2000, P.E.T.

ACH ADDITIONAL PAPER (5) COPIES IF NECESSARY ☒ CHECK HERE IF ADDITIONAL PAPER IS USED.

SULT OF ARCH E BRIEF IRATIVE WHAT PPENED

DATE AND TIME OF SEARCH 3-6-98 7:35 ☐ A.M. ☒ P.M.

ARREST ☒ YES ☐ NO.

JUDGE'S DISPOSITION ☐ DISC. ☒ HELD FOR COURT ☐ FURTHER HEARING ☐ FINED OR COMMITTED

PROPERTY SEIZED ☒ YES ☐ NO *(If "yes" list inventory on separate form, R2008 and enter control number(s) here* F12078)

SIGNATURE OF PERSON SEIZING PROPERTY BADGE NO. OTHER OFFICERS PARTICIPATING IN SEARCH: DAUPHIN COUNTY DRUG TASK FORCE OFFICERS

Signature of Affiant — Address of Private Affiant — Badge No. — District/Unit

Sworn to and subscribed before me this 6th day of March 1998. Office Address Orwigsburg Boro Hall Orwigsburg, Pa. 17961

Signature of Issuing Authority (SEAL) Mag. Dist. No. 21-3-03

BEST AVAILABLE COPY

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF SCHUYLKILL
vs.
Michael A. McGinley

R.P. Schaeffer, Schuylkill County Drug Task Force
Robert W. Phillips, Schuylkill County Drug Task Force

SEARCH WARRANT Date 3-6-98
AFFIDAVIT

SEARCH WARRANT # L 10110

Affiant Police Department

1. Officer R.P. Schaeffer Schuylkill County Drug Task Force, your co-affiant, is a narcotics officer and has been involved in numerous drug arrests and criminal investigations into violations of drug laws. Schaeffer has as previously participated in obtaining search warrants which have resulted in seizure of illegal drugs and the arrests and convictions of numerous violators. He has received training from the Pa. Office of the Attorney General for Drug investigations. In addition, Officer Schaeffer has received training from the Allentown Police Academy, Pa. State Police, F.B.I., Washington D.C. Metropolitan Council of Governments, Narcotics Enforcement Officer's Association and others. Officer Schaeffer had been a police officer since 1978. Schaeffer has conducted numerous drug investigations in his capacity with the Schuylkill County Drug Task Force.

2. Officer Robert Phillips, your co-affiant, is a narcotics officer and has been involved in numerous drug arrests and criminal investigations into violations of drug laws. Phillips has previously obtained search warrants which have resulted in seizure of illegal drugs and the arrests

and convictions of numerous violators. He has received training from the Pa. Office of the Attorney General for Drug investigations. In addition, Officer Phillips has received training from the Pa. State Police, Allentown Police Academy, the Federal Bureau of Investigation and others. Officer Phillips has been a police officer since 1985 and had been a military policeman for three years prior to that.

3. Officers Schaeffer & Phillips are special deputy narcotics agents with the Schuylkill Co. Drug Task Force. He is assigned to Schuylkill County. As such, they are empowered to conduct investigations into violations of the various laws of the Commonwealth including Act 64 of 1972, The Pa. Controlled Substance, Drug, Device, and Cosmetic Act. During the course of such investigations, the affiants are empowered to and authorized to apply for, obtain, and serve search warrants, make seizures, and make arrests.

4. Your affiants received information from confidential informant (here after referred to as CI-114-97) that purchases of methamphetamine could be made from Michael A. McGinley, 618 Center St. Ashland, Pa. CI-114-97 said that McGinley was dealing the methamphetamine from his residence.

5. CI-114-97 has been a member of the Schuylkill County drug culture for a number of years and therefore has gained the trust and confidence of area drug dealers and other criminals, and is familiar with those persons and their operations. CI 114-97 has made numerous purchases of various drugs from numerous targets under the supervision of Task Force members. These purchases have led to the arrest and conviction of the targets. The CI has provided information that was also confirmed by Michael Aulenbach, Schuylkill County Drug Task Force (SCDTF)

as information the Ashland Police Department has also obtained. CI 114-97 made controlled purchases of methamphetamine from Michael McGinley at his residence on a few occasions under the supervision of SCDTF members. The CI has also provided information about names of drug dealers, their addresses, the types of vehicles they drive, types of drugs involved and other intelligence information which has been confirmed through other sources and investigation.

6. During the week of Feb. 8, 1998, CI 114-97 made a controlled purchase of a quantity of methamphetamine from Michael McGinley at his residence/office. The CI was searched by an agent of the Schuylkill County Drug Task Force prior to entering McGinley residence/office. No monies and/or drugs were found during this search. The CI was then provided money to purchase the methamphetamine from McGinley. The CI entered McGinley residence/office and exited a short time later. CI 114-97 met Officers Michael Aulenbach and Jeffrey Walcott and turned over a bag of methamphetamine. This was later field tested by Walcott and received a positive reaction for the presence of methamphetamine. Walcott is a member of the Schuylkill County Drug Task Force and has been a police officer since 1991. He has received drug investigation training from the Pa. Office of Attorney General, the Allentown Police Academy, and others. He has conducted numerous drug investigations in his capacity as a police officer and member of the Schuylkill County Drug Task Force.

7. During the week of Feb. 15, 1998, CI 114-97 made a controlled purchase of a quantity of methamphetamine from Michael McGinley at his residence/office. The CI was searched by an agent of the Schuylkill County Drug Task Force prior to entering the McGinley residence/office. No monies and/or drugs were found during this search. The CI was then provided money to

purchase the methamphetamine from McGinley. The CI met McGinley and left a short time later. CI 114-97 met Officers Walcott and Aulenbach and turned over a bag of methamphetamine. This was later field tested by Walcott and received a positive reaction for the presence of methamphetamine.

8. During the week of Feb. 15, 1998, CI 114-97 made another controlled purchase of a quantity of methamphetamine from Michael McGinley at his residence/office. The CI was searched by an agent of the Schuylkill County Drug Task Force prior to entering McGinley residence/office. No monies and/or drugs were found during this search. The CI was then provided money to purchase the methamphetamine from McGinley. The CI met McGinley and left a short time later. CI 114-97 met Officers Walcott and Aulenbach and turned over a bag of methamphetamine. This was later field tested by Walcott and received a positive reaction for the presence of methamphetamine.

9. During the week of Feb. 15, 1998, CI 114-97 made another controlled purchase of a quantity of methamphetamine from Michael McGinley at his residence/office. The CI was searched by an agent of the Schuylkill County Drug Task Force prior to entering McGinley residence/office. No monies and/or drugs were found during this search. The CI was then provided money to purchase the methamphetamine from McGinley. The CI met McGinley and McGinley exited the residence and went into a red Volkswagen Rabbit which was parked in front of McGinley's residence. According to Ashland Police, this vehicle is owned and operated by McGinley. McGinley entered the residence and CI 114-97 left a short time later. CI 114-97 met Officers Walcott and Philips and turned over a bag of methamphetamine. This was later field tested by Walcott and received a positive reaction for the presence of methamphetamine.

10. During the week of Mar 01, 1998, CI 114-97 made a controlled purchase of a quantity of methamphetamine from Michael McGinley at his residence/office. The CI was searched by an agent of the Schuylkill County Drug Task Force prior to entering the McGinley residence/office. No monies and/or drugs were found during this search. The CI was then provided money to purchase the methamphetamine from McGinley. The CI met McGinley and left a short time later. CI 114-97 met Officers Walcott and Aulenbach and turned over a bag of methamphetamine. This was later field tested by Walcott and received a positive reaction for the presence of methamphetamine.

11. CI 114-97 has a prior criminal record with convictions for receiving stolen property, robbery, theft, simple assault, and DUI.

12. Information developed by the SCDTF from the Ashland Police Department and Pa. State Police Central Repository was that McGinley was previously arrested for drug violations on 12/11/91 and pleaded guilty to them.

13. A phone check through Westlaw Real Estate Service by Sgt. Robert Reedy, SCDTF showed that Michael McGinley owns the property at 618 Center St., Ashland, Pa. He has owned it for six years and has a median income between $31,300 and $32,800. Reedy and Phillips also researched the deeds at the Schuylkill County Court House and found that Michael A. McGinley is the owner of the property.

14. The Ashland Police Department has conducted surveillance on McGinley's residence/office for the past 8 months. In that surveillance, they observed Susan Hart enter the residence. Hart has been arrested for drug violations. Jeffrey Lavas was also observed

entering the residence. Lavas also has prior drug convictions. Numerous known Warlock Motorcycle gang members have also been seen entering or leaving McGinley's residence. Some of these Warlocks are Larry Scocik, Steve Bast, Joe Whitlock, Charles Zendrosky, William Cavanaugh and Ralph Jacavage. According to the Office of Attorney General, Bureau of Narcotics Investigation, criminal intelligence has been developed that the Warlocks are into the trafficking of methamphetamine. Lucille Dunleavy and Brian Dietrick, known drug users to members of the Ashland Police Department, have also been observed entering McGinley's residence.

15. On 02/19/98, Walcott was conducting surveillance with Phillips and R. P. Schaeffer on McGinley's residence. Walcott observed a vehicle pull up to the residence. A male exited the vehicle and the female driver said "hurry up and get the shit. I'll be right back." Walcott observed the male enter the McGinley residence. He left in a short time without carrying any objects that were visible in his hands. A check of the vehicle's registration showed it to be owned by Geraldine Hartz. Hartz is a known drug violator. The Schuylkill County Drug Task Force made controlled purchases of illegal drugs from her in 1992. She was also arrested by the Girardville Police in 1994 for controlled substance violations.

16. Within the last 48 hours, CI 114-97 made another controlled purchase of a quantity of methamphetamine from Michael McGinley at his residence/office. The CI was searched by an agent of the Schuylkill County Drug Task Force prior to entering McGinley residence/office. No monies and/or drugs were found during this search. The CI was then provided money to purchase the methamphetamine from McGinley. The CI met McGinley and left a short time later. CI 114-97 met Officers Phillips and Aulenbach and turned over a

bag of methamphetamine. This was later field tested by Phillips and received a positive reaction for the presence of methamphetamine.

17.This application seeks permission to search the premises of Michael McGinley 618 Center St. Ashland, Pa. and his red VW Rabbit bearing Pa. registration BNC-4044 as sales of methamphetamine have been made from the residence and vehicle. The search should also include all occupants of the residence as the information developed shows that McGinley has frequent visitors that purchase methamphetamine. These persons may be on the premises at the time of the execution of the search warrant and may attempt to conceal controlled substances on their persons.

18.Your co-affiants also know, based upon their training and experience as narcotic investigators, that drug dealers often keep the profits of their illegal activities in close proximity to them in order to maximize control and security over them and to avoid banking laws designed to alert law enforcement authorities of the existence of said proceeds. Often said dealers maintain records of their transactions in order to track supplies, sales made, profits, and monies owed and received.

19.Your co-affiants also know through their training and experience that drug dealers often carry weapons including firearms to protect themselves and their assets.

20.This application seeks permission to search all occupants of the residence and their belongings to prevent the removal, concealment, or destruction of any evidence requested in this warrant. It is the experience of your co-affiants that drug dealers often attempt to do so when faced with impending apprehension and may give such evidence to persons who do not actually

reside or own/rent the premises. This is done to prevent the discovery of said items in hopes that said persons will not be subject to search when police arrive.

21. As a result of the information developed, your affiant requests that a search warrant for methamphetamine and other controlled substances, drug paraphernalia, drug records, monies, proof of residence/ownership, documents, photographs, and weapons be issued for 618 Center St. Ashland, Pa., the residence of Michael McGinley and all occupants therein.

All of the above information is true and correct to the best of my knowledge and ability to determine such.

/s/ Robert W. Phillips 3-6-98
Affiant/Date

Sworn and subscribed before District Justice James R. Ferrier 21-3-03, this 6th day of March 1998.

/s/ James R. Ferrier
Issuing Authority

Magistrate District No. 21-3-03

JAMES R. FERRIER, DISTRICT JUSTICE
DISTRICT #21-3-03
Schuylkill County
My Commission Expires January 3, 2000

FILED
AUG 6 - 2004
OFFICE OF THE CLERK

No. 04-85

In The Supreme Court of the United States

JOSEPH GROODY, ET AL.,

Petitioners,

v.

JOHN DOE, PARENT AND NATURAL GUARDIAN OF MARY DOE, A MINOR, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On March 6, 1998, members of the Schuylkill County Drug Task executed a search warrant at the home of John Doe in Ashland, Pennsylvania. Doe's wife, Jane Doe, and his ten year old daughter, Mary Doe, were home at the time. The search warrant specifically authorized a search of John Doe. Neither Jane nor Mary Doe were specified as "persons to be searched," yet they were subjected to highly intrusive strip searches in a futile effort to find illegal drugs.

On March 6, 1998, based upon an eight month investigation, an Affidavit of Probable Cause and Search Warrant was presented to Magistrate James Ferrier. Pet. App. 63a-71a. On the face sheet of the search warrant, in the box entitled "Specific Description of Premises and/or Persons to be Searched", the following text appears:

> "Michael A. McGinley ["John Doe"] W/M DOB-03/10/55 Brown hair, Brown eyes, SSN 176486694 618 Center St. Ashland Pa. Two story building w/an underground cellar, outside cement steps to cellar, 2nd flr. has 3 windows surrounded by light colored brick – other brick is dark lower flr. has a door on the east side and 2 store front windows, another door in center of both windows."

Pet. App. 63a.

In the box entitled "Probable Cause Belief is Based on the Following Facts and Circumstances" the words "See affidavit of probable cause attached" were inserted. *Id.* The only other mention of the affidavit on the face of the warrant appears in the box entitled "Date of Violation." There, the words "Numerous, see attached affidavits (sic)" appear. *Id.*

The names of Mary Doe and Jane Doe do not appear on either the search warrant or affidavit.

Paragraph 17 of the affidavit reads as follows:

> "This application seeks permission to search the premises of Michael McGinley 618 Center St. Ashland, Pa. and his red VW Rabbit bearing Pa. registration BNC-4044 as sales of methamphetamine have been made from the residence and the vehicle. The search should also include all occupants of the residence as the information developed shows that McGinley has *frequent visitors that purchase methamphetamine.* These persons may be on the premises at the time of the execution of the search warrant and may attempt to conceal controlled substances on their persons."

Pet. App. 70a (emphasis added).

Paragraph 20 of the affidavit reads as follows:

> "The application seeks permission to search all occupants of the residence and their belongings to prevent the removal, concealment, or destruction of any evidence requested in this warrant. It is the experience of your co-affiants that drug dealers often attempt to do so when faced with impending apprehension and may give such evidence to persons who do not actually reside or own/rent the premises. This is done to prevent the discovery of said items in the hopes that said persons will not be subject to search when police arrive."

Pet. App. 70a-71a.

Armed with the warrant, Task Force police went to the John Doe house to carry out the search. As the officers

approached the house, they met John Doe and brought him into the house. Once inside, the officers found no visitors, but only John Doe's wife, Jane and their ten year old daughter, Mary. A female officer removed Jane and Mary Doe to an upstairs bathroom. They were instructed to empty their pockets and lift their shirts. The female officer patted their pockets. She then told Jane and Mary Doe to drop their pants and turn around. No contraband was found.

John and Jane Doe filed a complaint under 42 U.S.C. §1983 on their own behalf, and on behalf of Mary Doe, against the searching officers and their superiors, and against various government entities, alleging that the officers illegally strip searched Jane and Mary Doe. The District Court denied qualified immunity to petitioners Joseph Groody, Adam Bermodin, and Robert Phillips and Agent Robert Bruce, the four Task Force officials who were directly involved in the search of Jane Doe and Mary Doe.

On appeal, the Court of Appeals for the Third Circuit affirmed, finding no grounds for the qualified immunity defense. Judge Alito dissented.

REASONS WHY THE PETITION SHOULD BE DENIED

The Decision Below Is Entirely Consistent with Both this Court's Recent Decision in *Groh v. Ramirez*, 124 S.Ct. 1284 (2004) and with Decisions in Other Courts of Appeals

Petitioners seek review of a decision by the Court of Appeals for the Third Circuit that breaks no new legal ground, faithfully applies the standards set forth by this

Court in *Groh v. Ramirez*, 124 S.Ct. 1284 (2004), and which is fully consistent with the approach taken by other Courts of Appeals on the issue of whether a facially deficient search warrant can be validated by incorporation of an affidavit submitted in support of the warrant. Petitioners make no claim of a conflict in the circuit courts on the governing legal standard and can point to no substantial constitutional issue presented by the lower court opinion. In sum, the Third Circuit Court of Appeals applied well settled standards under the Fourth Amendment of which a reasonable officer would know, and there is no justification for review of this largely fact-based decision.

Petitioners do not dispute the fact that the search warrant, on its face, did not authorize the strip search of respondents. The specification of the "persons to be searched" was limited to John Doe, and not his wife and ten year old daughter. Nor do petitioners dispute the long standing and well settled Fourth Amendment requirement that a search warrant particularly describe the persons or area to be searched. *Marron v. United States*, 275 U.S. 192, 196 (1927). This core protection of the Fourth Amendment serves the essential purposes of memorializing the magistrate's determination as to the scope of the search, limiting the discretion of the officers who execute the warrant, and informing the subjects of the search as to the legal limits. *Id. See also*, Pet. App. 10a-11a.

To attempt to validate the search, petitioners claim that the allegations in the affidavit of probable cause were somehow incorporated into the search warrant, but as the court below made clear, as to the persons to be searched there was **no** such incorporation. The court below ruled, consistent with this Court's decision in *Groh v. Ramirez* and with the rulings of other Courts of Appeals, that a

court may make reference to the affidavit where "the warrant uses appropriate words of incorporation . . . " 124 S.Ct. at 1290 (citing cases in the Courts of Appeals). Importantly, incorporation is not effectuated by simply attaching the affidavit; an affirmative link must be made in the warrant itself before a court is authorized to apply the "incorporation" standard. *Id.* In suggesting some difference in approach (without making any specific claim of a conflict in the circuits), petitioners claim that the incorporation standard "has caused confusion – at least in the Third Circuit" (Pet. at 8) and that other circuits apply somewhat different standards. Neither proposition is valid.

First, as we demonstrate below, there is no confusion in the Third Circuit. The court below applied the governing standard in a straightforward manner to determine there was no incorporation as to the persons to be searched. Second, other Courts of Appeals have similarly required "suitable words of reference." *United States v. Maxwell*, 920 F.2d 1028, 1031, 1032 (D.C. Cir. 1990); *United States v. Vesikuru*, 314 F.3d 1116, 1121 (9th Cir. 2002). The court below recognized two limited exceptions to this requirement: reference to the affidavit is permissible to either clear up an ambiguity or clerical error in the warrant itself or to modify a search warrant that on its face authorizes an overbroad search. Pet. App. 12a-13a. Of course, neither of these situations is presented by this case, as the search warrant unambiguously limits the search to John Doe.

The cases cited by petitioner do not in any way support the argument that the opinion below "is at odds with" other courts or that no other court has articulated a rule "as strict as the Third Circuit's." Pet. App. 9a-10a. Rather, these cases involve either exceptions to the incorporation

doctrine or appropriate references to the affidavit. *See, Commonwealth v. Carlisle*, 534 A.2d 469 (1987) (affidavit *limited* search by listing specific apartment number where warrant only gave address of apartment building); *United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998) (where warrant specified person to be searched, and described that person along *with a detailed description of his residence*, search of the residence itself is permitted as a good faith execution of warrant for the premises); *United States v. Ortega-Jimenez*, 232 F.3d 1325 (10th Cir. 2000) (authorization in warrant to search persons "present and arriving" at designated place of search includes persons ordered by police to be at that location).[1] Notwithstanding inconsequential differences in the specific language used, as this Court has recognized, "most Courts of Appeals have [applied a standard of] appropriate words of incorporation." *Groh*, 124 S.Ct at 1290. The court below faithfully applied that standard in this case. There is no division in the lower courts.

On the merits, the court below was correct. First, the warrant specified a search of John Doe, and not his wife or child. Second, on this critical matter, there was *no* reference to the affidavit. Third, as noted by the court below, the fact that the affidavit was referenced with respect to the allegations of probable cause for the search "is actually unhelpful to the officers," Pet. App. 11a, since this reference was by its terms *limited* to the probable cause issue.

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[1] *State v. Carrillo*, 595 S.E.2d 219 (N.C. Ct. App. 2004), is consistent with this approach as there was a reference in the warrant authorizing a search of premises and persons "described in the application" for the warrant. Here, there was no such reference to an application of affidavit and only a single person was described as the person to be searched.

Fourth, even if the probable cause allegations could be referenced with respect to the quite distinct issue of who could be searched, there would be no justification for a strip search of the wife and ten year old daughter as the affidavit asserts only that visitors who are there to purchase drugs may be in possession.[2]

Groh v. Ramirez restated long-standing Fourth Amendment principles and denied a claim of qualified immunity for officers who executed a search warrant that did not particularly describe the persons or things to be seized. Here, as in *Groh,* the warrant did not authorize the search of the respondents, the warrant made no reference to the affidavit with respect to the persons to be searched, and the issuing magistrate did not alter the terms of the warrant before signing the document. Under these circumstances, there can be no claim to qualified immunity as the law has long been clearly established that a search of persons not particularly described in a warrant is unconstitutional. Given the state of the law, no reasonable officer could believe that a strip search of the wife and child of a person named in a warrant was permissible absent a specific reference to an affidavit that would supply this critical authorization which is specifically required by the Fourth Amendment. *Id.*

Indeed, this case presents even more compelling reasons to reject the qualified immunity defense than were

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[2] It should also be noted that this is not a case where officers had to act on the spur of the moment or to submit a warrant and warrant application under significant time pressure. This warrant was submitted after a several month investigation and there is no indication that the petitioners did not have ample time to draft and submit the warrant to the court.

present in *Groh* where the officers argued that the failure to list the property to be seized was a mere "clerical error." *Id.* at 1295 (Kennedy, J., dissenting). In *Groh*, the particularization of the property to be seized was made in both the affidavit and the application for search warrant and the entry on the warrant mistakenly listed the *place* to be searched instead of the items to be seized. Here, the warrant specifically named John Doe as the person to be searched and did not list Jane or Mary Doe. Thus, the warrant reflects a specific and limited authorization of who could be searched and that limitation was violated upon execution of the warrant. Moreover, the affidavit provides no grounds for a search of Jane and Mary Doe as the allegations that others might possess drugs is quite clearly limited to visiting drug buyers or dealers, and not family members. Pet. App. 70a-71a.

Petitioners' claim that the law with respect to incorporation is "far from settled," Pet. at 9, is fully rebutted both by this Court's discussion of that issue in *Groh,* 124 S.Ct. at 1290, and by a review of cases in the Courts of Appeals. The Third Circuit reviewed this warrant in the same fashion as this Court reviewed the warrant in *Groh* and reached the same conclusion as to the Fourth Amendment issues. Under settled principles, a reasonable officer would not believe that the search warrant provided authority for the strip searches of petitioners. *See Hope v. Pelzer,* 536 U.S. 730 (2002). There is no substantial constitutional issue presented for review.

CONCLUSION

Petitioners have provided no good reason for this Court to re-visit the issues recently addressed in *Groh v. Ramirez*. For the reasons stated in this Opposition, the Petition for Certiorari should be denied.

Respectfully submitted,

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